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No 82-1052

In the Supreme Court of the United States

OCTOBER TERM, 1982

OLD BEN COAL COMPANY,

Petitioner,

v.

CORNELIUS J. BLAIZE,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Seventh Circuit departed from accepted and usual judicial practice by vacating the Decision and Order of the Benefits Review Board and the Department of Labor Administrative Law Judge and deciding a federal question of mootness in a way that conflicts with applicable decisions of the United States Supreme Court.

II. Whether the United States Court of Appeals for the Seventh Circuit departed from accepted and usual judicial practice by failing to vacate all prior administrative decisions in this case, an action which conflicts with the applicable decisions of the United States Supreme Court.

PARTIES

All parties to this proceeding before the United States Court of Appeals for the Seventh Circuit are contained in the caption of the case before this Court with the exception of the Benefits Review Board of the Department of Labor.

Old Ben Coal Company is a wholly owned subsidiary of the Standard Oil Company (Ohio). Its subsidiary and affiliates are listed in Appendix G.

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OPINIONS BELOW

The August 16, 1982 Order of the United States Court of Appeals for the Seventh Circuit, which is here sought to be reversed, is unreported and is reprinted in Appendix B. The Order overruling the Petition for Rehearing dated September 22, 1982 is printed in Appendix A. The prior Opinion of the Benefits Review Board dated June 11, 1981 is reprinted in Appendix C. The Opinion and Order, dated February 28, 1980, of the Department of Labor, Administrative Law Judge, Stuart A. Levin is printed in Appendix D. The Department of Labor's Memorandum of Conference, dated April 6, 1979 is printed in Appendix E.

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit was filed on August 16, 1982. A further Order denying the Petition for Rehearing was filed on September 22, 1982. The statutory provision which confers jurisdiction on this Honorable Court is found at 28 U.S.C. § 1254(1) (1966).

STATUTES AND REGULATIONS INVOLVED

The pertinent text of the following statutes and regulations are set forth in the Appendix F.

Statutes:

26 U.S.C. § 9501(a)(2) (1982)
30 U.S.C. §902(i) (1982)
30 U.S.C. § 932(a) (1982)
30 U.S.C. § 932(c) (1982)
30 U.S.C. § 932(j) (1982)
33 U.S.C. §921(b)(3) (1978)
33 U.S.C. § 921(c) (1978)
33 U.S.C. § 922 (1978)
Pub. L. No. 97-119, Title II

Regulations:

20 C.F.R. § 725.309(c)
20 C.F.R. § 725.309(d)
20 C.F.R. § 725.310(a)
20 C.F.R. § 725.310(d)
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20 C.F.R. § 725.481
20 C.F.R. § 727.108(c)
20 C.F.R. § 801.102

STATEMENT OF THE CASE

On March 5, 1973, Cornelius J. Blaize applied for benefits under Title IV "Part B" (30 U.S.C. §§ 921-925) (1982) of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (1982) (the Act). His claim was denied by the Department of Health, Education and Welfare on September 25, 1973. The claim was subsequently approved on January 16, 1975 by Administrative Law Judge John R. Hood of the Bureau of Hearings and Appeals of the Social Security Administration. However, on September 2, 1975, the Appeals Council of that agency reversed this determination of entitlement on the grounds that Mr. Blaize was not totally disabled prior to July 1, 1973.

During the pendency of that litigation, on July 24, 1974, Mr. Blaize filed a claim for benefits under Title IV "Part C" of the Act, 30 U.S.C. §§ 931-945, with the Department of Labor (DOL).

On October 4, 1978 Claims Examiner, Fred P. May, an employee of Respondent, Director, Office of Workers' Compensation Programs (Director, O.W.C.P.) found Mr. Blaize entitled to benefits based on his erroneous interpretation of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239 (Reform Act). Old Ben was subsequently notified of the initial finding and of its alleged status as the operator responsible to pay Mr. Blaize's benefits. On October 20, 1978, Old Ben filed a controversion of liability. On March 16, 1979 an informal conference was conducted on the claim by Deputy Commissioner Edmond J. F. Fitzpatrick, an employee of Director, O.W.C.P. On April 6, 1979 Deputy Commissioner Fitzpatrick recommended that Mr. Blaize was eligible for benefits and found Old Ben liable for the payment of benefits. Old Ben disagreed with

this recommendation of entitlement and requested a formal hearing before a Department of Labor, Administrative Law Judge.

A hearing was held on September 24, 1979 in Vincennes, Indiana before Administrative Law Judge Stuart A. Levin. On February 28, 1980 the Administrative Law Judge found Mr. Blaize entitled to benefits as of July 1, 1974 under his erroneous interpretation of 20 C.F.R. § 727.203(a)(2). Old Ben appealed the Administrative Law Judge's decision to the Department of Labor, Benefits Review Board (Board). On June 11, 1981 the Board issued a Decision and Order reversing Judge Levin's award. The Director, O.W.C.P. appealed the Board's Decision and Order to the Court of Appeals for the Seventh Circuit. Mr. Blaize cross-appealed the Board's Decision and Order. The basis for jurisdiction of the Circuit Court of Appeals for the Seventh Circuit is 33 U.S.C. § 921(c) (1978), as incorporated by 30 U.S.C. § 932(a).

The Court of Appeals for the Seventh Circuit, by Order dated August 16, 1982, dismissed the appeals of the Director, O.W.C.P. and Mr. Blaize, and vacated the Orders of the Benefits Review Board and the Administrative Law Judge. This Order reinstated Mr. Blaize's entitlement to Federal Black Lung Benefits based on the Deputy Commissioner's recommendation dated April 6, 1979. On September 22, 1982 the Court of Appeals for the Seventh Circuit denied Old Ben's Petition for Rehearing.

ARGUMENT

I. The United States Court of Appeals for the Seventh Circuit departed from accepted and usual judicial practice by vacating the Decision and Order of the Benefits Review Board and Department of Labor Administrative Law Judge, and deciding a federal question of mootness in a way that conflicts with applicable decisions of the United States Supreme Court.

It is Old Ben's contention that the Court below erred in its application of mootness theories to the instant case in two ways:

A) The Court's disposition of the instant case conflicts with the applicable decisions of the United States Supreme Court;

B) The instant case is not entirely moot.

A.

In its Order dismissing the appeals of the claimant and the Director, O.W.C.P., the Court below cited the cases of *A.L. Mechling Barge Line, Inc.* v. *United States,* 368 U.S. 324 (1961) and *Tennessee Gas Pipeline Co.* v. *Federal Power Commission,* 606 F. 2d 1373 (D.C. Cir. 1979) in support of its action of vacating the Orders of the Benefits Review Board (Board) and the Administrative Law Judge (ALJ). The Court stated that "Blaize and the Director should not be bound by an order of the Board when appellate review fails because of intervening mootness." Appendix B. It is Old Ben's contention that the Court erred in vacating the Board and ALJ Orders by misinterpreting and misapplying the principles of *Mechling, supra, Tennessee, supra,* and the case upon which these rulings are

based, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

In *Munsingwear, supra*, the United States sued Munsingwear Inc. for alleged violations of a price-fixing regulation, seeking an injunction and treble damages. By agreement, the treble damages count was held in abeyance pending trial and final determination of the suit for an injunction. Holding that Munsingwear's prices complied with the regulation, the District Court dismissed the complaint. While an appeal was pending the commodity involved was decontrolled, and the Court of Appeals dismissed the appeal for mootness. The United States acquiesced in the dismissal and made no motion to vacate the District Court judgment. The District Court then dismissed the action for treble damages on the ground that the matter was *res judicata*. The Court of Appeals affirmed.

In declining to make an exception to the application of *res judicata* to the case, this Honorable Court noted that any hardship to the government was preventable: "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. Since, the United States failed to move for vacation of the District Court's judgment on the injunction, it was *res judicata* to the treble damages action.

The reason underlying this "established practice" was stated as follows: "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced

by a decision which in the statutory scheme was only preliminary." 340 U.S. at 40. The practice prevents ". . . a judgment, unreviewable because of mootness, from spawning any legal consequences." 340 U.S. at 41.

In *Mechling, supra,* this Honorable Court explained the governing principle of *Munsingwear, supra,* to be: ". . . [A] party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness . . . [T]hat principle should be implemented by the reviewing court's vacating the unreviewed judgment below [footnote omitted]." 368 U.S. at 329. Stating that this principle is equally applicable to unreviewed administrative orders, this Honorable Court modified the District Court Order dismissing the underlying complaint, and ordered remand to the Interstate Commerce Commission with directions to vacate its order. 368 U.S. at 331.

In *Tennessee, supra,* the Court of Appeals for the District of Columbia Circuit held that the controversy surrounding an order of the Federal Power Commission (FPC) had become moot pending appeal. In vacating the FPC Order and remanding the case to the FPC for further disposition, the Court cited *Munsingwear* and *Mechling* for the proposition that, where there are "no assurances that judicial review would ultimately be available," vacation is appropriate to avoid any conclusive effects of the administrative order. 606 F.2d at 1383.

In vacating the Board's Order, the Court below misapplied the principles of *Munsingwear* and *Mechling* because it misconstrued the nature of the case before it. Unlike the situation in *Munsingwear, Mechling,* and *Tennessee,* there are no collateral proceedings to which the

Board's judgment in the instant case may be applied. The effect of the Board's Order is to establish, as the final decision of the Secretary of Labor,[1] that the claimant is ineligible for benefits under the Act; on the basis of extensive medical and testimonial evidence, he is not totally disabled due to coal worker's pneumoconiosis. The Court below could not have found any inherent unfairness or prejudice to the claimant in allowing to stand the Board's denial of a claim which has been proven meritless.[2]

Furthermore, under the administrative procedural rules governing litigation of black lung claims, the Board's Order has limited, if any, *res judicata* effect. Under the provisions of 33 U.S.C. § 922 (1978), as incorporated by 30 U.S.C. § 932(a), the claimant may file a petition for modification alleging a change of condition or mistake in a determination of fact. Under this procedure, the Deputy Commissioner of the Director, O.W.C.P. has the power to "terminate, continue, or reinstate" benefit payments or made an award of benefits. 20 C.F.R. §§ 725.310(a), (d). As this Honorable Court has noted, the rights of modification under 33 U.S.C. § 922 are to be construed broadly and are not limited to any particular type of facts.[3]

In addition to the petition for modification, the claimant may file a new application for benefits. His entitlement to benefits will then be readjudicated. The *res judicata*

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[1] 33 U.S.C. § 921(b)(3) (1978) as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 801.102.

[2] *See Director* v. *Bethlehem Mines Corp.*, 609 F. 2d 187, 197 (4th Cir. 1982).

[3] *O'Keeffe* v. *Aerojet — General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks* v. *Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968), *reh. den.* 391 U.S. 929 (1968).

effect of the Board's Order is limited through the application of the principles of 33 U.S.C. § 922 to the new adjudication. *See* 20 C.F.R. §§ 725.309(c), (d). The determination of eligibility is ultimately reviewable by a Circuit Court of Appeals. 33 U.S.C. § 921(c). Therefore, the fear of prejudice to the claimant or the spawning of legal consequences due to *res judicata* is absent in the instant case.

Far from following the holding of *Munsingwear* that vacation is to avoid prejudice to the parties and the spawning of legal consequences,[4] the action of the Court below in vacating the Board's Order in fact creates prejudice and legal obligations where none existed. The Court below effectively passed on the merits of the claimant's case by changing the Secretary of Labor's ultimate denial of entitlement into a grant of entitlement payable by the Black Lung Disability Trust Fund (Trust Fund).[5] In doing so, the Court below acted contrary to the very purpose for which the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, were enacted; to relieve the financial insolvency of the Trust Fund and strengthen the eligibility standards of the Black Lung program. The Congress was concerned with the General Accounting Office (GAO) study indicating that black lung claims were being awarded by the Social Security Administration without adequate evidence of disability. *See Hearing on S. 1922 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources,* 97th Cong. 1st Sess. at 12-15, 20-21 (Comm. Print 1981). A recent GAO study reached the same conclusion with respect to the Depart-

[4] 340 U.S. at 41.

[5] 30 U.S.C. §§ 902(i), 932(j), 934.

ment of Labor's administration of the Reform Act.[6] By changing a denial into a grant, the Court below further depleted the Trust Fund assets.

Since, the underlying concerns of *Munsingwear* and *Mechling* are not present in this case and use of the *Munsingwear* procedure actually creates prejudice herein, the Court below erred in its vacation of the Board and ALJ orders.

B.

The Court below erred further in its determination that the case met the threshold requirement for application of the *Munsingwear, Mechling* doctrine: that the case be moot. As this Honorable Court recently pointed out in reversing its own order of dismissal in the case of *Crowell* v. *Mader*, 444 U.S. 505 (1980), use of the *Munsingwear*

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[6] *Report to the Congress; Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability*, General Accounting Office, Jan. 19, 1982. The summary of findings in this study states:

> The Federal Coal Mine Health and Safety Act, as amended, authorized the Department of Labor to approve black lung claims based on conflicting or inconclusive medical evidence, affidavits from spouses and others, or presumptions based on years of coal mine employment. GAO believes that medical evidence should be the basis for determining disability and death from black lung and that benefits should be awarded only to miners who are totally disabled by black lung or to their survivors. This report (1) suggest that the Congress consider amending the black lung legislation and (2) recommends that Labor provide more guidance on the evidence needed to rebut certain legislative presumptions and establish additional procedures for resolving conflicting medical evidence.
>
> Legislation passed by the Congress in December 1981 should resolve a number of GAO's concerns and result in better evidence to support approval of future black lung benefit claims.

procedure is only appropriate where intervening legislation makes the case entirely moot pending appeal.[7]

The Court below characterized the passage of the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, as intervening legislation which "requires this Court not only to dismiss this appeal but also vacate all adjudicatory proceedings below in which Old Ben was the only party to contest the initial administrative finding." Appendix B. However, this position overlooks the fact that while Pub. L. No. 97-119 made several prospective eligibility criteria changes, nothing in the Black Lung Benefits Amendments of 1981 alters the eligibility criteria applicable to this claim. This legislation does not mandate payment of benefits by the Trust Fund in a case such as this, where the claimant has been found to be ineligible for benefits. This legislation does not purge the record of evidence developed by the alleged responsible operator, nor does it in any way turn back the clock on a claim to some convenient time prior t the completion of the full administrative adjudication process. Clearly then, the issue of claimant's eligibility for benefits, the resolution of which is a prerequisite to the very existence of liability either for an employer or the Trust Fund, has not been rendered moot by the intervening legislation.

Beside the issue of eligibility, the issue of the proper interpretation of Sections 422 and 402 of the Federal Coal Mine and Safety Act of 1969, as amended by Section 205 of Pub. L. No. 97-119, codified at 30 U.S.C. §§ 932(c), (j), and 902(i) was squarely before the Court below. Liability for certain denied but subsequently approved black lung claims is transferred from the individual operator to the

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[7] *See also Duke Power Co.* v. *Greenwood County*, 299 U.S. 259 (1936); *Bryan* v. *Austin*, 354 U.S. 933 (1957); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412 (1972).

coal industry supported Trust Fund by 30 U.S.C. §§ 932(c) and (j). For a claim to fall within the transfer provisions under 30 U.S.C. § 932(j)(3) it must be one:

> . . . in which there was a claim denied before March 1, 1978, and such claim is or has been approved in accordance with the provisions of section 945 of this title.

A "claim denied" is defined by 30 U.S.C. § 902(i) to include one ". . . (1) denied by the Social Security Administration; . . ." It was Old Ben's contention before the Court below that the transfer provisions of Section 205 are not applicable to this case since the entire administrative review process involved in the claim must be considered before it can be identified as a "claim . . . approved" under Section 205, 30 U.S.C. §§ 902(i), 932(c), (j). The legislative history of Pub. L. No. 97-119 supports this view.

In testimony before the Subcommittee on Labor of the Committee on Labor and Human Resources, United States Senate, Mr. Robert B. Collyer, Deputy Under Secretary of Labor for Employment Standards, characterized the transfer provisions as follows:

> The administration proposes to transfer to the trust fund the liability for claims denied and closed prior to the 1977 amendments, and subsequently reopened and approved pursuant to the special review process established by those amendments. The purpose of this amendment is to relieve operators from a significant payment burden for which the insurance industry contends coverage is unavailable.

See Hearing on S. 1922 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong. 1st Sess., at 19 (Comm. Print 1981). A similar statement was made by Senator Orin Hatch when presenting S. 1922 on the floor of the Senate. *Congressional Record-Senate,* December 16, 1981, S. 15494.

The above mentioned review process for these claims is set out in 30 U.S.C. § 945. The Department of Labor regulations on the procedure to be followed in the review process are found in 20 C.F.R. §§ 727.101-109. Paragraph (c) of § 727.108 provides that the Deputy Commissioner may further develop the record and then "notify a coal mine employer, if any, of its possible liability for the claim and proceed to adjudicate the claim under §§ 725.408-725.421 of this subchapter." The referenced Part 725 regulations set out the appeal process from Deputy Commissioner, Administrative Law Judge, and Board decisions. *See generally* 33 U.S.C. §§ 919, 921 (1978) as incorporated by 30 U.S.C. § 932(a).

In the instant case, Old Ben filed a timely request for hearing on the Deputy Commissioner's recommendation of entitlement under the Reform Act. This action precluded the recommendation from becoming the final decision of the Secretary of Labor. 20 C.F.R. § 725.417(d). Following the Administrative Law Judge's grant of entitlement, Old Ben filed a timely Notice of Appeal with the Board. Old Ben's action precluded the Judge's decision from becoming final. 20 C.F.R. § 725.481. The Board reversed the ALJ's decision thereby denying entitlement. Under the statutory scheme, the Board has been empowered to determine finally for the Department of Labor appeals raising a substantial question of law. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 801.102. Accordingly, the final decision of the Department of Labor makes this claim a denial of entitlement and thus a denial of all liability for benefits. Therefore, it is not a claim approved as required by Section 205, Pub. L. No. 97-119, 30 U.S.C. §§ 932(c), (j).

Resolving the issue of proper interpretation of Section 205 is absolutely essential to the further disposition of this claim. Whether this case is or is not a "claim . . .

approved" under the provisions of Section 205 is determinative of whether liability, if any, is transferred to the Trust Fund.

Since, Pub. L. No. 97-119 did not affect the issue of claimant's eligibility for benefits, and its passage created the equally important threshold issue of defining what constitutes a claim approved under Section 205, the controversy before the Court below was not entirely moot. Following *Crowell, supra*, use of the *Munsingwear* procedure was completely inappropriate.

II. The United States Court of Appeals for the Seventh Circuit departed from accepted and usual judicial practice by failing to vacate all prior administrative decisions in this case, an action which conflicts with the applicable decisions of the United States Supreme Court.

It remains Old Ben's contention that the Court erred in vacating the Board and ALJ orders under the *Munsingwear, Mechling* doctrine. However, in the alternative, Old Ben contends that if this Honorable Court determines that the *Munsingwear, Mechling* doctrine is applicable herein, the Court below improperly applied said doctrine by failing to vacate all of the Department of Labor administrative recommendations, decisions and orders issued in this case.

In the Order appealed from, the Court below stated:

> The Revenue Act requires this Court not only to dismiss this appeal but also vacate all adjudicatory proceedings below in which Old Ben was the only party to contest the initial administrative finding.
>
> * * *
>
> We dismiss this appeal and vacate the orders of the ALJ and the Board. Since the initial finding of eligibility is not affected, and since the Director takes the

> position that Blaize is entitled to black lung benefits, we assume that appropriate action will be taken to transfer liability for payment to the Trust Fund. (Appendix B.)

By allowing the Deputy Commissioner's recommendation of entitlement to stand the Court below has elevated the initial administrative determination of Respondent, Director, O.W.C.P., to the status of a final approval by the Secretary of Labor in his capacity as a Trustee of the Trust Fund. 26 U.S.C. § 9501(a)(2) (1982).[8] As the record in this case indicates, and as permitted by 20 C.F.R. § 727.108, the first review of this claim was based solely on the one-sided record provided to the Director, O.W.C.P. by the claimant. As a result of Old Ben's involvement in the case, new evidence was added. A full exposition of the legal issues was made. After the full administrative adjudicatory process on the complete record, the claim was proven meritless and denied. By allowing this initial recommendation to stand while vacating the Board's denial, the Court's action directly contradicts the holding of *Munsingwear, supra.*

In *Munsingwear, supra,* vacation of all judgments below was said to be the "duty of the appellate court." The procedure was to clear "the path for future relitigation of

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[8] The Court below premised its remand for payment by the Trust Fund on the observation that the Director, O.W.C.P. does not oppose claimant's entitlement. However, the fiduciary duties of the Secretary of Labor as Trustee rest solely with the Secretary of Labor, not with the Director, O.W.C.P. Nothing in this record indicates that the Trustee, Secretary of Labor acquieses in the Director, O.W.C.P.'s recommendation of entitlement. In fact, the Secretary of Labor has not been a party in the case and this record contains no indication by the Secretary of Labor, or the other Trustees (Secretary of the Treasury, and Secretary of Health and Human Services) whether the Trust Fund assets should be preserved by defending the denial of the instant claim.

the issues" and prevent prejudice from "a decision which in the statutory scheme was only preliminary."[9] As characterized by the District of Columbia Circuit Court of Appeals, the *Munsingwear* procedure requires the Court "simply to vacate the entire disposition below—to wipe the slate clean."[10]

This Honorable Court has recently made the requirement to vacate all proceedings below abundantly clear in the case of *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979). That case held that "[u]pon dismissing as moot an appeal from the District Court's order requiring arbitration of a dispute as to respondent's discharge by petitioner—the arbitration proceedings having been completed before the appeal could be decided on the merits—the Court of Appeals erred in holding that the District Court's judgment should remain in effect." 442 U.S. at 92. The Petition for Certiorari was granted and the case remanded to the Court of Appeals with directions to vacate the District Court's judgment and to remand the case for dismissal.

This Honorable Court further noted[11] that the Court of Appeals presumed desire to show approval of the non-vacated District Court decision could not excuse its failure to follow the holding of *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259 (1936) which provided:

> Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss (299 U.S. at 267).

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[9] 340 U.S. at 40.

[10] *American Tel. & Tel. Co.* v. *I.C.C.*, 602 F. 2d 401, 411 (D.C. Cir. 1979).

[11] 442 U.S. at 93.

Assuming that the *Munsingwear* doctrine is applicable to this case, the Court below erred in not vacating all of the administrative recommendations, decisions and orders issued herein, including the recommendation of entitlement made by the Deputy Commissioner of the Director, O.W.C.P.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 22, 1982

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. PHILIP NICHOLS, JR., *Judge**
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 81-2188

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

vs.

OLD BEN COAL COMPANY and CORNELIUS J. BLAIZE, Respondents,

No. 81-2324

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

vs.

OLD BEN COAL COMPANY, Respondent,

and

CORNELIUS J. BLAIZE, Respondent-Cross Petitioner.

Petitions for Review of the Benefits Review Board.

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* The Honorable Philip Nichols, Jr., Judge of the United States Court of Claims, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for Old Ben Coal Company, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued March 30, 1982)
August 16, 1982

Before
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. PHILIP NICHOLS, JR., *Associate Judge**
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 81-2188

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

vs.

OLD BEN COAL COMPANY and CORNELIUS J. BLAIZE, Respondents,

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and

CORNELIUS J. BLAIZE,
Respondent-Cross Petitioner.

Petitions for Review of the Benefits Review Board.

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* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

ORDER

The Director and Blaize seek review of an order of the Department of Labor Benefits Review Board which overturned an ALJ finding that Blaize was entitled to black lung benefits in accordance with 20 C.F.R. § 727.203 (1980). While this cause was pending appeal, Congress enacted the Black Lung Benefits Revenue Act of 1981, P.L. 97-119, 95 Stat. 1635, which in part amended §§ 422 and 402 of the Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 923, 902. Because of that intervening enactment, we dismiss this appeal and vacate the decisions of the Benefits Review Board and the ALJ as moot.

All parties agree that Old Ben Coal must be dismissed as a party since the Revenue Act, Title II, § 205 relieves the operator of liability and requires that the type of claim asserted here be presented to the Secretary of Labor for review with benefits to be paid by the Black Lung Disability Trust Fund if approved by the Secretary. *See* H. Rep. No. 97-406, 97th Cong., 1st Sess. 5, 9 (1981), reprinted in U.S. Code Cong. & Ad. News 2671, 2674, 2677. The Director additionally filed a motion, in which Blaize concurred, to vacate the decision of the Board and to remand the case for assumption of liability for benefits by the Trust Fund. Old Ben opposes that motion.

Old Ben argues that the final adjudication of the Board must stand and that the Revenue Act "does not allow the Director to ignore the decision of the highest review authority for black lung cases within the Department of Labor simply because he disagrees with that decision." We disagree.

The Department initially approved Blaize's claim to benefits under "Part C." That initial review, made by a deputy commissioner, is the same whether the claim is against the operator or the trust fund. *See* 20 C.F.R.

§§ 727.108-.109 (1980). Old Ben was not a party to that proceeding inasmuch as the finding was essentially an administrative determination. *See id.* §§ 725.360, .412(a). After the deputy commissioner made the initial finding of entitlement, Old Ben was notified as a "responsible operator" and became a party entitled to invoke subsequent review. *See id.* §§ 725.360(a)(3), .412-.413. As a party, Old Ben contested the finding and thus thrust the matter into the adjudication phase. The regulations permitted Old Ben to present additional evidence to the deputy commissioner and invoke ALJ and Board review of any adverse findings. *Id.* 725-413-.422, 725.450 *et seq.*

The Revenue Act requires this court not only to dismiss this appeal but also vacate all adjudicatory proceedings below in which Old Ben was the only party to contest the initial administrative finding. It is clear that the jurisdiction for the proceedings which followed the initial finding was premised on Old Ben's status as a "party" and its decision to contest that finding. *See id.* §§ 725.360, .413(b)(2), .450, .481. The Revenue Act removes Old Ben as a "responsible operator" and thus its status as a "party" under the regulations. Moreover, Blaize and the Director should not be bound by an order of the Board when appellate review fails because of intervening mootness. *See A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329 (1961); *Tennessee Gas Pipeline Co.* v. *FPC*, 606 F.2d 1373, 1382-83 (D.C. Cir. 1979).

For the foregoing reasons, we grant the motion of the Director. We dismiss this appeal and vacate the orders of the ALJ and the Board. Since the initial finding of eligibility is not affected, and since the Director takes the position that Blaize is entitled to black lung benefits, we assume that appropriate action will be taken to transfer liability for payment to the Trust Fund.

APPENDIX C

CORNELIUS J. BLAIZE Claimant-Respondent v. OLD BEN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	80-301 BLA OWCP No. 346-01-1110 DECISION and ORDER

Appeal from the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Robert J. Araujo, Chicago, Illinois, for the employer.

Judith E. Wolf, Co-Counsel for Black Lung Benefits (T. Timothy Ryan, Jr., Solicitor of Labor; Laurie M. Streeter, Associate Solicitor) Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

Old Ben Coal Company (hereinafter, the employer) appeals from the Decision and Order of Administrative Law Judge Stuart A. Levin granting benefits to Cornelius J. Blaize (hereinafter, the claimant) pursuant to 20 C.F.R.

§727.203, which is contained in the Secretary of Labor's regulations implementing the Black Lung Benefits Reform Act of 1977. The Black Lung Benefits Reform Act of 1977 made substantial changes to various provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*, (hereinafter, the Act).

On appeal, employer contends that the interim presumption at 20 C.F.R. §727.203(a)(2) was not properly invoked since the original pulmonary function study of record did not specify degree of cooperation or comprehension and only a supplemental statement of the doctor based on a review of the study's tracings was offered into evidence to meet the requirements of 20 C.F.R. §410.430. Employer further argues that claimant does not have totally disabling pneumoconiosis, specifically pointing out Dr. Connerley's statement that claimant does not suffer from pneumoconiosis. We treat employer's argument as a contention that claimant does not have pneumoconiosis and that therefore the interim presumption has been rebutted pursuant to 20 C.F.R. §727.203(b)(4). The Director, in his response, argues that the administrative law judge's award of benefits is based on substantial evidence, properly applies the interim presumption and should be affirmed.

The claimant filed a Part C claim for black lung benefits on July 24, 1974.[1] Following a hearing which was held on

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[1] We note that claimant also filed an application for black lung benefits with the Department of Health, Education, and Welfare on March 5, 1973, under Part B of the Act. That claim was initially denied by the Department of Health, Education, and Welfare on September 25, 1973, and denied again on reconsideration. After a hearing, an administrative law judge of Health, Education, and Welfare granted claimant benefits on January 16, 1975. Social

(footnote continued)

September 24, 1979, the administrative law judge determined that claimant was entitled to invocation of the interim presumption based on a pulmonary function study of record pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge also found that employer had failed to rebut the presumption pursuant to 20 C.F.R. §727.203(b)(4). Accordingly, the administrative law judge found that claimant was entitled to benefits.

The Board's scope of review is governed by statutory authority. The trier of fact is charged with evaluating the credibility of the evidence and witnesses; the Board may not reweigh the evidence, but must accept the administrative law judge's factual conclusions unless unsupported by substantial evidence, not in accordance with law or irrational. 33 U.S.C. §921(b)(3) as incorporated by 30 U.S.C. §932(a); *O'Keeffe* v. *Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (1965); *Peabody Coal Co.* v. *Benefits Review Board*, 560 F.2d 797, 802, 6 BRBS 434 (7th Cir. 1977), *aff'g Wells* v. *Peabody Coal Co.*, 4 BRBS 506, BRB No. 75-219 BLA (1976).

(footnote continued)

Security's Appeals Council reversed the administrative law judge, however, and denied the claim for benefits on September 2, 1975. On October 4, 1978, the Department of Labor notified claimant that his application for benefits and been reviewed under the provisions of the 1977 Reform Act and that based on this review he appeared to be entitled to benefits. The employer was identified as the potentially liable responsible operator and controverted its liability on the Part C claim filed July 24, 1974. The administrative law judge based the Decision and Order on appeal here solely on this July 1974 claim. We also base our review solely on the claimant's 1972 Act Part C application for benefits.

With this in mind, we turn to the issue of whether the interim presumption was properly invoked. Employer contends that the interim presumption at 20 C.F.R. §727.-203(a)(2) was not properly invoked because the only pulmonary function study of record does not meet the Section 410.430 quality standards.

In the Decision and Order on appeal, the administrative law judge found that the only pulmonary function study in the record invoked the presumption. This study was performed on January 29, 1974, by Dr. Marion L. Connerley and resulted in an FEV_1 of 1.215 and an MVV of 40 with claimant's height recorded as 70 inches. The regulatory table at 20 C.F.R. §727.203(a)(2) provides that in order to invoke the interim presumption, a claimant 70 inches tall must score an FEV_1 of 2.5 or less coupled with an MVV of 100 or less. Thus, the pulmonary function study of record resulted in qualifying values. 20 C.F.R. §727.203(a)(2).

Pursuant to 20 C.F.R. §727.206(a), however, only a ventilatory test which meets the quality standards applicable at the time the evidence was submitted is considered sufficient to invoke the interim presumption. Thus the pulmonary function study of record in the instant case must also be conforming, *i.e.*, meet the quality standards set forth at 20 C.F.R. §410.430 in order to constitute substantial evidence sufficient to support the administrative law judge's invocation of the interim presumption.

Section 410.430 requires that "a statement shall be made as to the individual's ability to understand the directions, and cooperate in performing the tests." 20 C.F.R. §410.430. The pulmonary function study in the instant case, however, was submitted into evidence without such a state-

ment. The hearing record was kept open to allow counsel to obtain a statement as to claimant's cooperation and comprehension during his performance of the test. Post-hearing, the administrative law judge received and admitted into evidence a letter from Dr. Connerley which indicated that he had reviewed the study's tracings and concluded that claimant's cooperation and comprehension were adequate. The administrative law judge held this statement to be sufficient to bring the pulmonary function study of record into compliance with the mandatory quality standards and therefore invoked the interim presumption based on it.

Employer, however, objects to invocation of the presumption arguing that Dr. Connerley's subsequent review of the study's tracings to determine claimant's cooperation and comprehension is not acceptable and does not make the study conforming. Employer argues that Section 410.430 does not mention reviewing tracings to determine cooperation and comprehension and does not pose alternative methods for complying with the regulation. It is employer's position that the only purpose for keeping the hearing record open was to see if a record existed which was recorded at the time the test was administered and indicated claimant's cooperation. Since no such records were produced, employer contends that the requirements of Section 410.430 were not, and could not be, met.

We agree with the administrative law judge that Section 410.430 mandates no specific method to be used in ascertaining claimant's cooperation and comprehension. In this case, a later review of the study's tracings by the administering physician was used to meet the requirements of 20 C.F.R. §410.430. We hold this review to be an acceptable method of determining claimant's cooperation

and comprehension.[2] The administrative law judge also noted that employer did not submit any contrary medical evidence and did not submit any evidence that review of tracings is not an analytically valid basis for assessing understanding and cooperation. Given this evidentiary record, we affirm invocation of the interim presumption as in accordance with law and supported by substantial evidence in the record considered as a whole.

Employer further argues that the administrative law judge focused on one item of evidence only and did not properly consider the other relevant evidence in the record before invoking the presumption. Section 727.203(a), however, by its terms, permits a claimant to invoke the presumption "if one of the . . . medical requirements is met." 20 C.F.R. §727.203(a).[3] Thus adjudication officers have only to weigh conflicting evidence of like type, *i.e.*, pulmonary function studies pursuant to Section 727.203

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[2] Dr. Martin Welch, in an article entitled "Ventilatory Function of the Lungs" stated that, when a competent and conscientious technician carries out the test procedures and when a recording of the tracings obtained accompanies the battery of measurements recommended, interpretation of the data may render a satisfactory judgment as to validity in most cases. Dr. Welch indicates that a poor effort spirogram can usually be identified. In a list of poor effort patterns, Dr. Welch indicates that an uneven, slurred or notched curve can indicate poor effort. Dr. Welch further stated that the validity of any normal spirogram can be inferred from close reproducibility on repeated performance and from the appearance of smooth expiratory curves, without continued notching or slurring, until a plateau is achieved. *Pulmonary Medicine*, Clarence A. Guenter, M.D., editor; Martin Welch, M.D., associate editor; (1st ed., 1977) pp. 96-97.

[3] For an example of pre-invocation weighing of several pulmonary function studies, *see Strako* v. *Zeigler Coal Co.*, BLR ___, BRB No. 79-188 BLA (May 14, 1981).

(a)(2), before invocation. They must consider all other relevant evidence in terms of rebuttal pursuant to Section 727.203(b).

In the present case, there was only one pulmonary function study in the record and therefore only one study relevant to invocation under subsection (a)(2) of Section 727.203. Thus, the administrative law judge acted properly when he considered only that pulmonary function study prior to Section 727.203(a)(2) invocation and weighed the other relevant evidence under the rebuttal methods of Section 727.203(b). We, therefore, reject the employer's argument that the administrative law judge incorrectly focused on one item of evidence.

We now turn to the issue of whether the interim presumption was rebutted. Employer argues that the claimant does not have totally disabling pneumoconiosis and therefore is not entitled to benefits. We will treat employer's argument as a contention that claimant does not have pneumoconiosis and that therefore the interim presumption has been rebutted pursuant to 20 C.F.R. §727.203 (b)(4). In the Decision and Order on appeal, the administrative law judge also determined that the only subsection of 727.203(b) relevant in the instant case was (b)(4). That subsection provides that the interim presumption is rebutted if the evidence establishes that the miner does not, or did not, have pneumoconiosis.

In making his finding pursuant to 20 C.F.R. §727.203(b) (4), the administrative law judge carefully weighed the x-ray evidence of record and determined that claimant did not have clinical pneumoconiosis. He concluded that the weight of the evidence established that the claimant's respiratory condition was pulmonary emphysema. The administrative law judge further stated that, since claim-

ant's emphysema was presumed to be pneumoconiosis under Section 727.203(a), in order to rebut the presumption, employer must show that claimant's emphysema did not fall within the definition of pneumoconiosis as set forth in 20 C.F.R. §727.202. After reviewing the medical evidence, the administrative law judge found that the employer had not offered any evidence that established that claimant's pulmonary emphysema was not included in the definition of pneumoconiosis. Thus, the administrative law judge concluded that employer had failed to rebut the presumption pursuant to 20 C.F.R. §727.203(b)(4). After review of the medical evidence and case law, however, we hold that the employer has rebutted the interim presumption by establishing that the miner does not have pneumoconiosis. 20 C.F.R. §727.203(b)(4).

Section 402(b) of the Act provides that the term "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. §902(b). The corresponding regulation, 20 C.F.R. §727.202, provides:

> For the purposes of the act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosisanthro-silicosis,[4] massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis arising out of coal mine employment. For the purposes of this definition, a disease 'arising out of coal mine employment'

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[4] There is a typographical error in this section of the regulations. We read the word which appears "anthracosisanthrosilicosis" as anthracosis and anthrosilicosis. *Lohr v. Rochester and Pittsburgh Coal Co.*, 2 BLR 1-1070 (1980).

> includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.[5]

20 C.F.R. §727.202.

There are several chest x-rays[6] and medical reports of record relevant to a determination of whether claimant

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[5] The Fifth Circuit has expressed serious reservations concerning aggravation of impairment due to coal dust exposure as a basis for entitlement. *See United States Steel Corp.* v. *Gray*, 588 F.2d 1022, 1026, footnote 3 (5th Cir. 1979). Claimant here does not raise the issue, and we, therefore, do not consider it in the instant case.

[6]

Date of X-ray	*Doctor*	*Reading*	*Rereading*	*Doctor*
8/69	Weitzel	pulmonary emphysema	N/A	
8/15/72	Weitzel	no active pulmonary parenchymal disease but indicates pleural thickening in both costrophrenic angles	N/A	
3/16/73	Beeler	1/0	1/0t 1/0	Strong Winttlesey
1/28/74	Connerley	0/0 emphysema	N/A	
9/5/79	Pruitt	chronic lung disease with emphysema and fibrosis	N/A	

has pneumoconiosis. On January 31, 1974, Dr. R. E. Weitzel diagnosed claimant as suffering from pulmonary emphysema, intermittent bronchial asthma, and hypertension. In a narrative report dated August 7, 1974, Dr. Weitzel stated that he had known claimant for many years and indicated that chest x-rays were consistent with pulmonary emphysema but no active pulmonary parenchymal disease. *See* footnote 6, *supra*. Dr. Weitzel diagnosed obesity, periodic bouts of mild hypertension and chronic pulmonary deficiency due to pulmonary emphysema. In a medical report dated January 29, 1974, Dr. Marion L. Connerley indicated that a chest x-ray showed category 0/0 opacities as well as emphysema and that claimant had a 68 percent permanent partial pulmonary disability, 100 percent of which was due to obesity, hypertension and obstructive type pulmonary emphysema. Dr. Connerley further stated that there was no pneumoconiosis in the patient. The most recent medical evidence of record is a report of claimant's September 1979 hospitalization. On claimant's discharge sheet, Dr. D. E. Pruitt diagnosed acute cardiovascular attack with encephalitis and lower extremity weakness, obesity, generalized arteriosclerotic heart disease and benign prostatic hypertrophy. Dr. Pruitt also stated that chest x-ray revealed chronic lung disease with emphysema and fibrosis. *See* footnote 6, *supra*.

In reviewing this medical evidence, it must be emphasized that all three doctors of record agree that claimant's respiratory condition is emphysema. In addition, Dr. Connerley, based on an x-ray, physical examination and ventilatory study, specifically stated that claimant does not have pneumoconiosis.

It has been established that medical opinion, other than a radiologist's opinion based solely on a negative chest x-ray, may suffice to rebut a presumption by establishing

that claimant does not have pneumoconiosis. *United States Steel Corp.* v. *Gray*, 588 F.2d 1022, 1027, 9 BRBS 638, 642 (5th Cir. 1979) construing 30 U.S.C. §921(c)(4). In the instant case the medical opinion of record is unanimous in stating that claimant has emphysema and in not diagnosing pneumoconiosis.

In this respect the *Gray* court stated that "emphysema . . . is not a chronic dust disease of the lung arising out of employment in the coal mines" and does not qualify as "statutory pneumoconiosis under either the definition set forth in the 1969 Act as amended in 1972, or the new definition enacted as part of the 1977 Reform Act." *Gray, supra*, 588 F.2d at 1027, fn.3.

Therefore, we conclude that the administrative law judge improperly weighed the medical evidence of record in that instant case with respect to 20 C.F.R. §727.203(b)(4). After careful consideration of the medical evidence of record and prior case law, we hold that claimant does not have pneumoconiosis and that therefore employer successfully rebutted the interim presumption pursuant to 20 C.F.R. §727.203(b)(4).

Accordingly, the Decision and Order granting claimant benefits is reversed.

SO ORDERED.

Dated this 11th
day of June 1981

MILLER, Administrative Appeals Judge, dissenting:

I vigorously dissent from the decision reversing the administrative law judge's award of benefits.[1]

After recognizing that the "Black Lung Benefits Reform Act of 1977 made substantial changes to various provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969," the majority proceeds to ignore the Reform Act and its implementing regulations, and places sole reliance on a misreading of *dicta* in an isolated pre-Reform Act decision. Therefore, I must discuss this case, as did the administrative law judge, under the applicable law.

The cornerstone of the Reform Act is Section 402(f)(2) which provides that with regard to determinations of total disability:

> Criteria applied by the Secretary of Labor in the case of—
>
> > (A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor under Section 435(a);

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[1] I must note at the outset that in reversing the decision of the administrative law judge, my colleagues decline to address the aggravation doctrine of Section 727.202 because claimant has not raised the issue. Majority opinion, n. 5. The majority overlooks that it is employer who appeals from the award of the administrative law judge. Moreover, since the administrative law judge based the award, in part, on employer's failure to introduce any evidence as to "whether the diagnosed pulmonary emphysema is aggravated by coal dust exposure" as required by Section 727.202 and thus concluded that employer did not rebut the interim presumption of Section 727.203 pursuant to Section 727.203(b)(4), Decision and Order at 7, I fail to see how my colleagues can reverse this determination, and find rebuttal as a matter of law pursuant to Section 727.203(b)(4), without considering the issue. But my colleagues have done exactly that.

(B) any claim which is subject to review by the Secretary of Labor under Section 435(b); and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. §902(f)(2) (emphasis added).[2]

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[2] Criteria applicable to a claim filed on June 30, 1973, are found at 20 C.F.R. §410.490 which provides:

Interim presumption. With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be toally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see Section 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in Section 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table: [Table omitted].

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see Sections 410.416 and 410.456).

(3) With respect to a miner who meets the medical re-

(footnote continued)

Prior to the enactment of the Reform Act, Section 402(f), 30 U.S.C. §902(f), mandated,

> that the regulations regarding black lung benefits 'shall not provide more restrictive criteria than those applicable under Section 423(d) of Title 42 (Social Security Act).' Therefore, if the 'total disability' test [was] met under the Social Security criteria, then total disability due to black lung [was] also established.

Collins v. *Mathews*, 547 F.2d 795, 798 (4th Cir. 1976).

Similarly, Section 402(f)(2) now mandates that criteria applied by the Department of Labor in this claim shall not be more restrictive than the criteria of 20 C.F.R. §410.490. Section 410.490 provides for a presumption of total disability due to pneumoconiosis. The Department of Labor has promulgated the regulations at 20 C.F.R. §§727.200

(footnote continued)

> quirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.
>
> *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:
>
> (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see Section 410.412(a)(1)), or
>
> (2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see Section 410.412(a)(1)).

20 C.F.R. §410.490(b) and (c).

et seq. to implement the congressional mandate requiring criteria no more restrictive than the interim adjudicatory rules of 20 C.F.R. §410.490. *See* 20 C.F.R. §727.200. Therefore, if the "total disability due to pneumoconiosis" test would be met under 20 C.F.R. §410.490, then total disability due to pneumoconiosis is also established under the Department of Labor regulations.

To effectuate the congressional mandate of Section 402(f)(2), the Department of Labor has promulgated the interim presumption of 20 C.F.R. §727.203.[3]

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[3] Section 727.203 provides:

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see Section 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in Section 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table: [Table omitted].

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table: [Table omitted].

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evi-

(footnote continued)

A comparison of the presumptions of Section 410.490 and Section 727.203 illustrates that the administrative law judge correctly interpreted Section 727.203, *i.e.*, in accordance with the congressional mandate of Section 402(f)(2) of the Act, whereas my colleagues have interpreted Section 727.203 so as to violate the congressional mandate.

The Department of Labor has provided regulations for the invocation of the Section 727.203 presumption by x-ray evidence and ventilatory studies which are materially identical to the regulations of Section 410.490(b)(1). *Compare* 20 C.F.R. §§727.203(a)(1) and (a)(2) *with* 20 C.F.R. §§410.490(b)(1)(i) and (b)(1)(ii).[4]

(footnote continued)

dence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see Section 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see Section 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

[4] There are additional means of invocation in Sections 727.203 (a)(3), (a)(4), and (a)(5) which have no counterpart in Section 410.490(b). In promulgating Section 727.203, the Secretary of Labor recognized that the Reform Act regulations "provide addi-

(footnote continued)

With regard to rebuttal of the Section 410.490 and Section 727.203 presumptions, the Department of Labor has provided regulations for the rebuttal of the Section 727.203 presumption by evidence of continued work and ability to engage in work which are materially identical to the rebuttal provisions of Section 410.490(c). *Compare* 20 C.F.R. §§727.203(b)(1) and (b)(2) *with* 20 C.F.R. §§410.490(c)(1) and (c)(2). However, the rebuttal standards of Section 727.203(b)(3) and (b)(4) have no counterparts in Section 410.490(c). Thus, any application of the rebuttal standards of Section 727.203(b)(3) and (b)(4), at least when the presumption is invoked by evidence which would also have sufficed to invoke the Section 410.490(b) presumption, *i.e.*, x-ray evidence (Section 727.203(a)(1)) and ventilatory studies (Section 727.203 (a)(2)), must be carefully scrutinized to insure that they do not violate the "no more restrictive" requirement of Section 402(f)(2), 30 U.S.C. §902(f)(2).

(footnote continued)

tional standards, not available in [Section 410.490], by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment." 20 C.F.R. §727.200. However, the deletion of standards, available in Section 410.490, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis does not appear to have been contemplated. Neither is any such deletion permissible under the Section 402(f)(2) "no more restrictive" requirement. 30 U.S.C. §902(f)(2).

> The Department does not agree with the view that the interim standards cannot as a matter of law be more favorable to claimants than the Social Security Administration standards. The Act requires only that the Department's standards be no more restrictive than those applied by the Social Security Administration.

43 *Fed. Reg.* 36826 (Discussion and Changes of Department of Labor in Response to Comments Received, Adoption of 20 C.F.R. Part 727).

Careful scrutiny of Section 410.490 and Section 727.203 reveals that the rebuttal standards of Sections 727.203 (b)(3) and (b)(4), *if correctly interpreted in accordance with the applicable definitions of 20 C.F.R. §727.202,* do not go beyond the scope of rebuttal of Section 410.490(c), and hence, *as promulgated,* do not violate the "no more restrictive" requirement of Section 402(f)(2), 30 U.S.C. §902(f)(2).

The presumption of Section 410.490, once invoked, provided that a "miner will be presumed to be totally disabled due to pneumoconiosis." 20 C.F.R. §410.490(b). Section 410.490 also required that the impairment which sufficed to invoke the presumption arose out of coal mine employment. 20 C.F.R. §410.490(b)(2). To this end, Section 410.490 referred to Section 410.416 which provides that:

> If a miner was employed for 10 or more years in the Nation's coal mines, and is suffering or suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that pneumoconiosis arose out of such employment.

20 C.F.R. §410.416(a). For the purpose of Section 410.416(a), "pneumoconiosis" includes any condition that may be the basis for application of any presumption of total disability due to pneumoconiosis. 20 C.F.R. §410.401 (b). *See also* 20 C.F.R. §410.490(b)(3). Thus, Section 410.416(a) is not limited to "clinical" pneumoconiosis, but rather applies equally to "presumed" pneumoconiosis. *See Ansel* v. *Weinberger,* 529 F.2d 304, 310 (6th Cir. 1976).

In sum, Section 410.490 provided that a miner who met the medical requirements of Section 410.490(b)(1)(i) [x-ray evidence] or Section 410.490(b)(1)(ii) [ventilatory studies] and was employed for ten or more years in coal mine employment, Section 410.490(b)(3) and Section 410.416(a)

as applied by Section 410.490(b)(2), is presumed totally disabled due to pneumoconiosis, Section 410.490(b)(2), arising out of coal mine employment, Section 410.490(b)(3) and Section 410.416(a) as applied by Section 410.490 (b)(2).[5]

The Section 727.203 presumption provides that with regard to a miner with ten or more years of coal mine employment who satisfies any of the medical criteria in Section 727.203(a)(1-5), the miner is presumed totally disabled due to pneumoconiosis arising out of that employment. The rebuttal standards of Section 727.203(b)(1) and (b)(2) are the only means of rebuttal provided in Section 410.490(c). Entitlement pursuant to the Section 410.490 presumption could also be rebutted by "persuasive evidence" that pneumoconiosis (clinical or presumed) did not arise out of coal mine employment. 20 C.F.R. §410.416 (a) as applied by 20 C.F.R. §410.490(b)(2). Therefore, the rebuttal standards of Sections 727.203(b)(3) and (b)(4), which may not be broader in scope than the rebuttal standards of Section 410.490, are legally valid if, and only if, subsections (b)(3) and (b)(4) provide for rebuttal *only* by persuasive evidence that pneumoconiosis (true or presumed) did not arise out of coal mine employment.

The Department of Labor has carefully defined the term pneumoconiosis for the purpose of Section 727.203 so as to comply with the congressional mandate of Section 402(f)(2), 30 U.S.C. §902(f)(2). 20 C.F.R. §727.202. How-

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[5] The Section 410.490 presumption also applied to miners with less than ten years of coal mine employment and x-ray evidence of pneumoconiosis. 20 C.F.R. §410.490(b)(1)(i); 20 C.F.R. §410.416(b) as applied by 20 C.F.R. §410.490(b)(2); *Cantrell* v. *Califano*, 578 F.2d 549 (4th Cir. 1979); *Lynn* v. *Director*, ____ BLR ____, BRB No. 80-257 BLA (May 11, 1981) (Miller, J., dissenting).

ever, by applying pre-Reform Act case law, the majority interprets pneumoconiosis restrictively in Section 727.203 (b)(4), an interpretation which violates the mandate of Section 402(f)(2).[6]

The majority fails to give any effect to the expanded definition of pneumoconiosis in Section 727.202 which provides:

> For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracocilicosis, anthracosisanthro-silicosis [sic], massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis arising out of coal mine employment. For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.

20 C.F.R. §727.203(b)(2). It is apparent that the applicable definition of pneumoconiosis includes clinical pneumo-

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[6] Since rebuttal pursuant to Section 727.203(b)(3) is not involved in the instant case, it is not necessary to discuss this rebuttal standard in relation to the Section 402(f)(2) "no more restrictive" requirement. I must note that in *Jones* v. *The New River Co.*, ___ BLR ___, BRB No. 79-386 BLA (June 10, 1981), my colleagues found that Section 727.203(b)(3), in placing too heavy a burden on the *employer*, exceeded the scope of the Act, and thus invalidated the language "in whole or in part" in Section 727.203(b)(3). While my colleagues have never addressed the validity of the interim presumption pursuant to the applicable mandate of the Act in Section 402(f)(2), they have not hesitated to find that rebuttal standards with no clear counterpart in Section 410.490 are not sufficiently restrictive of entitlement. *See also* n. 7 of this dissent, infra

coniosis (coal workers' pneumoconiosis) as well as a broad range of pulmonary or respiratory impairments which may be significantly related to, or aggravated by, dust exposure in coal mine employment (presumed pneumoconiosis).[7] It is equally apparent that this broad definition of pneumoconiosis must be given effect to comply with the Section 402(f)(2) requirement that the criteria of Section 727.203 be no more restrictive than the criteria of Section 410.490. The existence of pneumoconiosis was only relevant to precluding entitlement under Section 410.490 to the extent that employer established by persuasive evidence that claimant's pneumoconiosis (true or presumed) did not arise out of coal mine employment. 20 C.F.R. §410.490 (b)(2); 20 C.F.R. §410.416(a).

In finding the Section 727.203 presumption rebutted by evidence which merely tends to show the nonexistence of clinical pneumoconiosis, the majority ignores the definition

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[7] I must note that my colleagues have found the aggravation doctrine in the Section 727.202 definition of pneumoconiosis invalid as imposing too great a burden on the *employer* in violation of the provisions of the Act. Thus, in *Ovies* v. *Director*, ____ BLR ____, BRB No. 80-344 BLA (June 11, 1981), my colleagues invalidated the language "or aggravated by" in Section 727.201. Again, my colleagues ignored the Section 402(f)(2) "no more restrictive" requirement and found that Section 727.202 was not sufficiently restrictive of entitlement. Once again, this determination was made in regard to a regulation relevant to a rebuttal standard (Section 727.203(b)(4)) which does not even have a clear counterpart in Section 410.490. *See* n. 6 of this dissent, *supra*. It has been stated that the complexity of this Act requires that in the "march through the statutory thicket . . . our conclusion views the forest rather than merely the trees." *Director* v. *Alabama By-Products Corp.*, 560 F.2d 710, 720 (5th Cir. 1977). However, the majority has apparently concluded that the march through the thicket must include trimming of those regulatory branches which obscure *their* view of entitlement.

of pneumoconiosis in Section 727.202, and without explanation, relieves the employer of its regulatory burden to establish by persuasive evidence that claimant's totally disabling respiratory disease is not a chronic[8] dust disease of the lung, its sequelae, or a respiratory or pulmonary impairment, significantly related to, or aggravated by, dust exposure in coal mine employment.[9] Moreover, the interpretation of the majority violates Section 402(f)(2), 30 U.S.C. §902(f)(2), by interpreting Section 727.203(b)(4) as requiring rebuttal as a matter of law based on evidence legally insufficient to rebut the presumption of Section 410.490.

However, the erroneous analysis of the majority goes beyond their failure to give effect to, and violation of, the Section 402(f)(2) "no more restrictive" requirement and the applicable implementing definition of pneumoconiosis in Section 727.202. My colleagues then proceed to find the Section 727.203 presumption rebutted as a matter of law pursuant to a misreading of *dicta* in *United States Steel Corp.* v. *Gray*, 588 F.2d 1022, 1 BLR 2-168 (5th Cir. 1979).

In *Gray*, a case decided under the Act as amended in 1972, the Court, applying the definition of pneumoconiosis in the 1972 Act, stated that "emphysema, however ag-

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[8] The term "chronic" is defined broadly under the Act. *See Rose* v. *Clinchfield Coal Co.*, 614 F.2d 939 n. 3, 2 BLR 2-38, 42 n. 3 (1980), *rev'g* 9 BRBS 690, BRB No. 76-490 BLA (1979) (Miller, J., dissenting).

[9] With regard to erroneously relieving employer of its burdens of proof under the Act, the Fourth Circuit has previously reversed a decision of my colleagues pursuant to the Section 411(c)(4), 30 U.S.C. §921(c)(4), presumption, for erring "in failing to impose on the [employer] the burden of rebutting this presumption." *Rose*, 614 F.2d at 939, 2 BLR at 43.

gravated by coal dust, is not a chronic dust disease of the lung arising out of employment in the coal mines." 588 F.2d at 1027 n. 3. Thus, the court merely concluded that emphysema, which was related to coal mine employment only by its aggravation, did not constitute pneumoconiosis under the 1972 Act's definition. This is axiomatic since "aggravation" was not included in the 1972 Act's definition of pneumoconiosis and there was *medical evidence* in *that* record that claimant's emphysema was not directly caused by coal dust exposure. The Court then went on to state:

> The issue has not been fully briefed by the parties, but it does not seem to us that emphysema aggravated by dust exposure qualifies as statutory pneumoconiosis under either the definition set forth in the 1969 Act as amended in 1972, or the new definition enacted as part of the 1977 Reform Act, *see* note 1 *supra*. We note that the hearing officer's 'aggravation theory' is embodied in the new regulation issued by the Secretary of Labor pursuant to his 30 U.S.C. §936(a) authority, which gives a very expansive meaning to the statutory term 'chronic dust disease of the lung.' *See* 43 Fed. Reg. 36825 (1978) (to be codified at 20 C.F.R. §727.202). Although we recognize that the Board's and the Secretary's interpretation of the statute is entitled to great deference, the new regulation does appear to reach very far, perhaps beyond the intendment of the statute. The validity of the 'aggravation' theory is not before us, however, because the new regulation was not applied in this case and because it is not clear whether the Review Board applied the 'aggravation' theory.

588 F.2d at 1027 n. 3. With regard to the Reform Act, the *Gray* court only commented, in noting the aggravation theory of Section 727.202, that emphysema *aggravated by coal dust* is *perhaps* beyond the range of the Reform Act's

definition of pneumoconiosis. These are the so-called "serious reservations concerning aggravation" which my colleagues refer to in their footnote 5, *supra,* in conjunction with their decision to "not consider [aggravation] in the instant case." The *Gray* court did not address (in decision or *dicta*) the Reform Act's expansion of the definition of pneumoconiosis in Section 402(b) to include "sequelae [of pneumoconiosis and] respiratory and pulmonary impairments, arising out of coal mine employment," 30 U.S.C. §902(b), or the implementation of this expansion in the regulatory definition in Section 727.202. Contrary to the view of my colleagues, *Gray* did not even consider, let alone decide, whether emphysema which *is* caused by coal dust exposure, or is so presumed, falls within the 1972 *or* 1977 Act definition of pneumoconiosis.[10]

Thus my colleagues' decision to relieve employer of the burden of establishing the nonexistence of pneumoconiosis as defined in the Act and regulations rests solely upon a court's comments on one aspect of the expanded definition (aggravation), a comment which my colleagues state they do not consider. Majority opinion, n. 5.

The administrative law judge avoided the errors in legal analysis which plague the majority decision. Rather, the administrative law judge carefully considered the evidence of record and concluded:

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[10] In a decision filed on the same day as the majority decision in the instant case, my colleagues correctly recognized that the *Gray* "court considered whether *emphysema aggravated by dust exposure* qualifies as pneumoconiosis under the Reform Act." *Ovies* v. *Director, OWCP,* ____ BLR ____, BRB No. 80-344 BLA (June 11, 1981) slip op. at 13 n. 5 (emphasis added). I do not quarrel with this interpretation of *Gray* proffered but my colleagues, but it is inconsistent with the interpretation in the instant case.

> Under Section 727.203(a), Mr. Blaize's emphysema is presumed to fall within the definition of pneumoconiosis. Consequently, the employer, under Section 727.203(b)(4), may rebut this presumption by showing that the emphysema does not fall within the definition of pneumoconiosis set forth in Section 727.202. This possibly might be done through the introduction of evidence establishing that the disease a claimant has was neither significantly related to coal dust exposure, nor aggravated by it. (20 C.F.R. §727.202) Here, however, the medical evidence is silent in respect to whether Mr. Blaize's emphysema is work-related; nor has a physician specifically stated whether the diagnosed pulmonary emphysema is aggravated by coal dust exposure. In view of the requirement that the employer must show 'that the miner does not . . . have pneumoconiosis' to rebut the interim presumption under 20 C.F.R. §727.203(b)(4), and given the silence in this record in respect to whether or not Mr. Blaize's emphysema arose out of coal mine employment or is aggravated significantly by coal dust exposure, Old Ben Coal Company has failed to establish that the diagnosed pulmonary emphysema is not pneumoconiosis within the meaning of Section 727.202 of the regulations. The employers' evidence is, therefore, insufficient to rebut the interim presumption under 20 C.F.R. §727.203(b)(4).

Decision and Order at 7. The discussion of the administrative law judge adequately demonstrates that the employer introduced no evidence to meet its burden of establishing the nonexistence of pneumoconiosis to rebut the interim presumption under Section 727.203(b)(4), pursuant to either the statutory or the regulatory definition of pneumoconiosis. Section 402(b), 30 U.S.C. §902(b); 20 C.F.R. §727.202.

Since in all respects the decision of the administrative law judge is supported by substantial evidence, rational,

and in accordance with law, I would affirm his decision. *Peabody Coal Co.* v. *Benefits Review Board*, 560 F.2d 797 (7th Cir. 1977).

In refusing to apply the statutory or regulatory definition of pneumoconiosis and failing to require the employer to establish the nonexistence of true or presumed pneumoconiosis, my colleagues have once again manifested the same erroneous analysis which prompted the Fourth Circuit to state:

> These [provisions of the Act and regulations] spell out modifying presumptions which serve to endow the term 'pneumoconiosis' with a broad definition, one that effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.
>
> * * *
>
> The creation of certain presumptions favoring claimants and the corresponding imposition of certain burdens on those opposing claims under the Act reflect the purpose of the statute. *See* 30 U.S.C. §901 Congress intended that the Act should receive a liberal construction in favor of the miner or his dependents. *See, e.g., Wheatley* v. *Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (D.C. Cir. 1968). Having failed to hold the [employer] to their statutory burden, the Board improperly denied claimant Rose the benefit of the presumption. . . .

Rose, supra, 614 F.2d at 938-39, 2 BLR at 41-44. In *Ansel* v. *Weinberger, supra*, the Sixth Circuit disposed of the interpretation which the majority proffers in stating:

> We believe that the district court failed to distinguish between 'true' statutory pneumoconiosis, which can be directly proved by x-ray and biopsy, and 'presumed' pneumoconiosis which exists when an eligible applicant is totally disabled because of a pulmonary or respira-

> tory impairment but cannot prove true pneumoconiosis. To hold that presumed pneumoconiosis is rebutted by evidence which merely precluded a finding of true pneumoconiosis would render the presumption of Section 411(c)(4) a nullity.

Ansel, supra, 529 F.2d at 310.

Rose and *Ansel* were decided under the 1972 Act. Congress has expanded the definition of pneumoconiosis in the Reform Act and the Department of Labor has implemented this expansion. Section 402(b), 30 U.S.C. §902(b); 20 C.F.R. §727.202. The majority ignores this expansion, and in so doing, violates the explicit congressional command contained in Section 402(f)(2), 30 U.S.C. §902(f)(2).

Therefore, for all of the reasons expressed in this opinion, I dissent, and would affirm the decision of the administrative law judge.

It is provided in 20 C.F.R. §802.410 that any party adversely affected or aggrieved by a decision of the Board may file a petition for review with the appropriate United States court of appeals pursuant to 33 U.S.C. §921(c) within 60 days of the filing of the Board's decision. In the instant case the majority opinion was filed on June 11, 1981.

Dated this 29th

day of July 1981

APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Dated: 28 February 1980

Case No. 79-BLA-150

OWCP No. D346-01-1110

In the Matter of

CORNELIUS JOHN BLAIZE

Claimant

and

OLD BEN COAL COMPANY

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

DAVID O. KELLEY, ESQUIRE
For the Claimant

ROBERT J. ARAUJO, ESQUIRE
For the Employer

LEE D. RICHARDSON, ESQUIRE
For the Employer

Before: Stuart A. Levin
Administrative Law Judge

OPINION AND ORDER AWARDING BENEFITS

This case involves a claim for black lung benefits by Mr. Cornelius John Blaize of Hazelton, Indiana. Originally filed on March 5, 1973, the claim was denied by the Social Security Administration on September 21, 1975. While his claim with the Social Security Administration was pending, Mr. Blaize, on July 24, 1974, filed a claim for black lung benefits with the Department of Labor, Division of Coal Mine Workers' Compensation. Following the denial of his Social Security claim and the enactment of the Black Lung Benefits Act of 1977, Pub. L. No. 95-239, his Department of Labor claim was approved and Old Ben Coal Co. was notified that it was the mine operator deemed liable for the payment of benefits to Mr. Blaize from January 1, 1974. Old Ben contested the award, and the case was scheduled for trial.

On September 24, 1979, a hearing was conducted at Vincennes, Indiana. Each participant was afforded a full opportunity to present evidence and oral argument, and each was represented by counsel.

The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witness who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.[1]

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[1] The following abbreviations will be used as citations to the record:

DX — Director Exhibits. To facilitate the review and evaluation of the record, each page of multiple-page exhibits are further identified alphabetically. (For example, the pages of DX 1, a four-page exhibit, are individually identified DX 1-A, 1-B,

(footnote continued)

Issues

The issues in this case are: (1) whether the claimant suffered from coal worker's pneumoconiosis; (2) the causal relationship of any pneumoconiosis to claimant's coal mine employment; (3) whether the claimant is totally disabled; and (4) whether any disability was due to coal worker's pneumoconiosis.

Findings of Fact

1. Cornelius John Blaize, age 67, is educated through the tenth grade. (DX 1-A) He is married and his wife, Bernice, is a dependent for the purpose of augmentation of benefits. (Tr. 5)

(footnote continued)

1-C, and 1-D, respectively.)

CX — Claimant Exhibits.

Tr. — Transcript of the hearing.

The record in this matter was held open to afford counsel for the claimant and for the director an opportunity to obtain a copy of a report concerning Mr. Blaize's recent hospitalization and a report from the physician who administered certain ventilatory tests (DX 9) concerning the claimant's cooperation and understanding in respect to taking the test. Following a motion for an extension of time, claimant produced the physician's report on October 18, 1979, and the employers' comments were received on October 24, 1979. These documents, marked for identification as CX 1-A, 1-B, and RX 1-A, 1-B, are admitted into evidence. By letter dated January 4, 1980, the claimant forwarded a copy of the records concerning his hospitalization at Gibson General Hospital, Princeton, Indiana. The submission crossed in the mail with a show cause order which was served on the parties undated by the docket section of this office. Claimant provided copies of his hospital records to counsel for the employer and for the director, and as of this date, neither has objected to their admission into evidence. Accordingly, records of the Gibson General Hospital, marked for identification as CX-2, are admitted into evidence.

2. Mr. Blaize worked for Old Ben Coal Company or its predecessors at the Kings Station mine from February 8, 1948, until December 11, 1973, when the mine closed and Mr. Blaize quit working. (DX 1-A, 2-3; Tr. 6-7, 10-11) During the course of his employment, Mr. Blaize had various jobs including topman, jerryman, and beltman; the latter included cleaning up the coal spills around an underground beltline. (Tr. 7-9, DX 19-N).

3. Mr. Blaize has compiled a work record of 24 years, 10 months in or around various coal mines as a miner. Old Ben Coal Company has been identified correctly as the responsible operator.

4. When the Kings Station mine closed, Mr. Blaize, upon the advice of his physician, decided not to continue working in the mines. (Tr. 10) At the time, he was experiencing shortness of breath and was having difficulty walking the length of the beltline. (Tr. 10-11)

Medical Evidence

X-rays

5. X-ray Date: March 16, 1973.
Physician: J. W. Beeler.
Impression: Small irregular opacities, type "s," 1/0. (DX 5)

6. X-ray Date: March 16, 1973.
Physician: Phillip Whittlesey.
Impression: Small opacities 0/0. (DX 6)

7. X-ray Date: March 16, 1973.
Physician: Maria A. Strong.
Impression: Small irregular opacities, type "t," 1/0. (DX 7)

8. X-ray Date: January 28, 1974.
Physician: MLC.
Impression: Opacities 0/0. (DX 8) Emphysema, pulmonary obstructive type. (DX 10-B)

9. X-ray Date: August, 1969; Report Date: August 7, 1974.
Physician: Roland E. Weitzel.
Impression: Pulmonary emphysema. (DX 11)

10. X-ray Date: August 15, 1972; Report Date: January 18, 1974.
Physician: Illegible.
Impression: Pulmonary emphysema, bronchial asthma. (DX 19-S thru 19-T)

11. X-ray Date: September 5, 1979.
Physician: D. E. Pruitt.
Impression: Chronic lung disease with emphysema and fibrosis. (CX 2)

Pulmonary Function Studies

12. Test Date: January 29, 1974.
Physician: Connerley.
Miner's Height: 70 inches.
FEV_1: 1.215.
MVV: 40. (DX 9-A thru 9-C)
Tracings included. Cooperation and Comprehension: adequate. (CX 1-B)

Other Medical Evidence

13. Dr. Marion L. Connerley examined Mr. Blaize on January 28, 1974. Considering Mr. Blaize's work history and symptoms, (including dyspnea, shortness of breath, and the fact that he had no cough but slept sitting up), x-ray data, and pulmonary function tests, Dr. Connerley

concluded that Mr. Blaize had a 68 percent permanent partial pulmonary disability due to obesity, hypertension, and emphysema, "there being no pneumoconiosis in this patient." (DX 10-A)

14. Dr. R. E. Weitzel prepared a report on August 7, 1974. After noting that he has known Mr. Blaize for many years, and reporting a "few fine rales" in each lung, he diagnosed obesity, hypertension, and chronic pulmonary deficiency due to pulmonary emphysema. (DX 11)

15. Dr. Weitzel, following a physical examination of the claimant, noted that the lungs were clear bilaterally, with no dullness to percussion, rales, or consolidation. (CX 2)

Discussion

I.

Under 20 CFR §727.203(a), Mr. Blaize may be presumed to be totally disabled due to pneumoconiosis arising out of such employment if one of the following four medical requirements is met:

> (1) An x-ray, biopsy, or autopsy establishes the existence of pneumoconiosis (Subsection 203(a)-(1));
>
> (2) Ventilatory tests yield values equal to or below 2.5 for the FEV_1 and 100 for the MVV (Subsection 203(a)(2));
>
> (3) Blood gas studies yield values equal to or below the values set forth in Subsection 203(a)(3);
>
> (4) Other medical evidence establishes the existence of a totally disabling respiratory or pulmonary impairment (Subsection 203(a)(4)).

The evidence in this record satisfies the regulatory standard set forth in Subsection 203(a)(2). On January

29, 1974, Mr. Blaize underwent a ventilatory test administered by Dr. Connerley. The test results showed an FEV_1 of 1.2 and an MVV of 40, values well below criteria of total disability specified in the regulations for a miner 70 inches tall.

It should be noted, however, that the employer objects to this evidence on the ground that the test report originally submitted by Dr. Connerley failed to mention the claimant's understanding and cooperation in taking the test. Accordingly, the report initially failed to meet an important quality standard required by the regulations.

Following the hearing in this matter, counsel for the claimant contacted Dr. Connerley, the record having been held open for this purpose, to determine whether this defect could be cured. Dr. Connerley reported back on October 17, 1979. He concluded that Mr. Blaize's comprehension and cooperation in taking the test were adequate and stated that this conclusion was based upon a review of the tracings. Old Ben again objected, noting that the regulations do not provide for an assessment of understanding and cooperation based upon an evaluation of the tracings.[2]

The regulations at 20 CFR §410.430 specify no particular methodology which must be employed in evaluating a claimant's understanding and cooperation in respect to a ventilatory test. An evaluation based upon a study of tracings is, therefore, not precluded. In this instance, it is the opinion of Dr. Connerley that understanding and cooperation can be determined from a review of tracings, and the tracings here, in his opinion, indicate both were adequate.

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[2] Dr. Connerly also volunteered a legal analysis of the merits of this case to which the employer properly takes exception and which has been disregarded.

The employer was afforded an opportunity to submit evidence to the contrary. It was free, for example, to show through its own experts either that tracings are an analytically invalid basis for assessing understanding and cooperation or that Dr. Connerley's interpretation of these particular tracings is incorrect. Yet no further evidence was offered. The employer, instead, would interpret the regulations in a way which presumably would allow for an assessment of understanding and cooperation only by those who administer a ventilatory test. If accepted, this argument, without supporting evidence, could virtually preclude an employer from challenging a ventilatory test under circumstances in which the tracings may evidence a clear lack of cooperation, or preclude a claimant from challenging a notation that he or she failed to cooperate under circumstances in which the tracings indicate the contrary.

As previously mentioned, the regulations do not foreclose an assessment of understanding and cooperation by anyone other than those who perform the test. Moreover, the evidence here indicates that a review of the tracings provides a valid alternative method of evaluation in the absence of an on-the-spot determination by the technician or physician who administered the test. Accordingly, the ventilatory test in evidence triggers the interim presumption.

Rebuttal

The regulations at 20 CFR §727.203(b) provide four methods of rebutting the interim presumption. The record fails to demonstrate that Mr. Blaize is doing or is capable of doing his usual coal mine work or comparable and gainful work, or that his disability did not in part arise out of coal mine employment. Subsections 203(b)

(1), (2), and (3) are, therefore, not applicable. The final method requires a showing that the miner does not, or did not, have pneumoconiosis. (Section 727.203(b)(4))

The record shows that Mr. Blaize does not have clinical pneumoconiosis. The x-ray evidence, including the interpretation of Dr. Whittlesey, a "B" reader, is, on balance, negative for pneumoconiosis. In addition, Dr. Connerley found "no pneumoconiosis in this patient." More recently, Dr. Pruitt found x-ray evidence of chronic obstructive lung disease with emphysema and fibrosis; yet his report fails to categorize the fibrosis in accordance with the classifications set forth in 20 CFR §410.428. Thus the weight of the evidence indicates the respiratory impairment involved here is pulmonary emphysema. (DX 10-B, 11, 19-S thru 19-T, 10-A, 11; CX 1-B)

Although on this record the doctors distinguish clinical pneumoconiosis from pulmonary emphysema, the latter nevertheless may fall within the legal definition of pneumoconiosis set forth in Section 727.202 of the regulations.

Pulmonary emphysema is not listed specifically under this legal definition, and it may not necessarily be the equivalent of legally defined pneumoconiosis in all cases. Rather, it may be included in the definition if it is found to have arisen "out of coal mine employment." The regulation further provides that it will be deemed to arise out of coal mine employment if it is "significantly related to, or aggravated by, dust exposure in coal mine employment."

Under Section 727.203(a), Mr. Blaize's emphysema is presumed to fall within the definition of pneumoconiosis. Consequently, the employer, under Section 727.203(b)(4), may rebut this presumption by showing that the emphysema does not fall within the definition of pneumoconiosis set forth in Section 727.202. This possibly might be done

through the introduction of evidence establishing that the disease a claimant has was neither significantly related to coal dust exposure, nor aggravated by it. (20 C.F.R. §727.202) Here, however, the medical evidence is silent in respect to whether Mr. Blaize's emphysema is work related; nor has a physician specifically stated whether the diagnosed pulmonary emphysema is aggravated by coal dust exposure. In view of the requirement that the employer must show "that the miner does not . . . have pneumoconiosis" to rebut the interim presumption under 20 CFR §727.203(b)(4), and given the silence in this record in respect to whether or not Mr. Blaize's emphysema arose out of coal mine employment or is aggravated significantly by coal dust exposure, Old Ben Coal Company has failed to establish that the diagnosed pulmonary emphysema is not pneumoconiosis within the meaning of Section 727.202 of the regulations. The employers' evidence is, therefore, insufficient to rebut the interim presumption under 20 CFR §727.203(b)(4).

For the foregoing reasons, I find that Mr. Blaize is entitled to the benefits claimed as augmented by reason of his one dependent, commencing July 1, 1974, the first day of the month in which his claim was filed with the Department of Labor.

Attorney's Fees

Claimant's counsel, David O. Kelley, has submitted an application for legal fees totaling seven hundred sixty-two dollars and fifty cents ($762.50). This fee represents legal services billed at a rate of fifty dollars ($50) per hour for 15¼ hours. The employer was provided with a copy of this application and has interposed no objection to it.

I have carefully reviewed counsel's request, find it reasonable in all respects, and hereby approve it.

ORDER

IT IS ORDERED that Old Ben Coal Company pay:

(1) To the claimant, all benefits to which he is entitled under the Act augmented by reason of his one dependent described above, commencing July 1, 1974.

(2) To the claimant, all medical and hospitalization benefits to which he is entitled, commencing July 1, 1974.

(3) To the Secretary of Labor, reimbursement for any payment the Secretary has made to the claimant under the Act and to deduct such amounts, as appropriate, from the amounts the employer is ordered to pay under paragraphs 1 and 2 above.

(4) To the Secretary of Labor or to the claimant, as appropriate, interest at the rate of 6 percent per annum from the date upon which each payment was due until the date upon which payment is actually made.

(5) To David O. Kelley, the sum of seven hundred sixty-two dollars and fifty cents ($762.50) for legal services rendered to the claimant.

/s/ *Stuart A. Levin*
Stuart A. Levin
Administrative Law Judge

APPENDIX E

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION

Washington, D.C. 20210

Office of Workers' Compensation Programs

Division of Coal Mine Workers' Compensation

Miner: Cornelius Blaize

Claim No: D-346-10-1110

Date of Conference: March 16, 1979

Gentlemen:

Enclosed is a copy of the Memorandum of Conference and Stipulation of Uncontested and Contested Issues in the referenced claim.

The Regulations provide that the parties shall, in writing, indicate their acceptance or rejection of all or part of the recommendation(s) of the Deputy Commissioner within thirty (30) days. If a recommendation is rejected, the rejecting party shall state the reason(s) for such rejection. Either party may reject a recommendation, in whole or in part, and may request a formal hearing before the Office of Administrative Law Judges of the U.S. Department of Labor.

The Regulations further provide that if no reply is received by this office within thirty (30) days from the date the Memorandum is sent to the parties, the recommendation(s) made therein shall be considered accepted by the parties and a proposed decision and order may be issued. Consistent wtih the recommendation(s) contained in the Memorandum of Conference and after careful consideration of all evidence submitted by the parties, it has been

initially determined that the claimant is eligible for benefits under the Act. Accordingly, Old Ben Coal Company, should begin payment of benefits within thirty (30) days of the date of this letter, and upon making the first payment, immediately return the enclosed "Notice of First Payment" (CM-906) and executed "Agreement to Pay Benefits" (CM-941) to this office.

Should you fail to begin payment to the claimant, benefits will be paid by the Black Lung Disability Trust Fund in accordance with 20 CFR 725.420. If you are subsequently determined to be liable for the claim you will be required to reimburse the Fund for all payments made up to that time. In addition, you will be liable for such penalties and interest as are deemed appropriate together with the payment of the claimant's attorney fee, if any. You may contact me on telephone number (202) 523-6792 if you have any questions.

Sincerely,

/s/ Edmond J. F. Fitzpatrick
EDMOND J. F. FITZPATRICK
Deputy Commissioner

Enclosure: CM-906, CM-941
Memorandum of Conference
Stipulation of Uncontested and Contested Issues

cc: Cornelius Blaize
Box 133
Hazleton, In. 47640

Old Ben Coal Co.
500 N. DuQuoin St.
P.O.B. 659
Benton, Il. 62812

David O. Kelley
125 So. 2nd St.
Boonville, In. 47601

EMPLOYMENT STANDARDS ADMINISTRATION

Office of Workers' Compensation Programs

MEMORANDUM OF INFORMAL CONFERENCE

(Under the Black Lung Benefits Act)

1. Claimant
Cornelius J. Blaize

2. Claim Number
D-346-10-1110

3. Operator
Old Ben Coal Company

4. Insurer
The Standard Oil Company of Ohio

5. Date and time of Conference (month, day, year)
Friday - March 16, 1979

6. Place of Conference
Federal Bldg., Evanville, In.

7. Appearances: (Name, address, telephone number, and status)

For Claimant:
Cornelius J. Blaize
Box 133
Hazelton, In. 47640

For Employer/Carrier
G. E. Hopkins
Old Ben Coal Company
500 W. Main St.
Benton, Il. 62821
618-435-8176

For Other Parties:

8. Issues Discussed at Conference:

A. Timeliness of claim.

B. Applicant's employment as a coal miner and duration of employment.

C. Evidence of pneumoconiosis, its severity and relationship to coal mine employment.

D. Identity of the responsible coal mine operator.

E. Augmentation of benefits for Bernice Blaize.

9. Additional material presented at Conference (X-rays, medical reports, marriage certificates, employment reports, birth certificates).
None.

10. The following issues were resolved (See attached CM-943):

A. Timeliness of claim.

B. Applicant's employment as a coal miner and duration of employment.

C. Identity of the responsible operator.

D. Augmentation of benefits.

11. Upon discussion of the issues involved among those present, together with due consideration to all information in the administrative file, the following recommendation is made.

RECOMMENDATION

That the presented evidence establishes that Cornelius J. Blaize is totally disabled by pneumoconiosis, arising out of coal mine employment and is eligible for benefits under the Black Lung Benefits Reform Act of 1977.

That such benefits should be augmented for Bernice Blaize, the miner's wife.

That Old Ben Coal Company is the responsible operator liable for the provisions of these benefits, effective January 1, 1974.

APR 6 1979 /s/ *Edmond J. F. Fitzpatrick*

Date Deputy Commissioner

APPENDIX F

PERTINENT TEXT OF CITED STATUTES AND REGULATIONS

STATUTES:

26 U.S.C. §9501(a)(2)(1982) provides:

> Trustees.—The trustees of the Black Lung Disability Trust Fund shall be the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services.

30 U.S.C. §902(i)(1982) provides:

> For the purposes of subsections (c) and (j) of section 932 of this title, and for the purposes of paragraph (7) of subsection (d) of section 9501 of Title 26, the term "claim denied" means a claim—
>
> (1) denied by the Social Security Administration; or
>
> (2) in which (A) the claimant was notified by the Department of Labor of an administrative or informal denial more than 1 year prior to March 1, 1978, and did not, within 1 year from the date of notification of such denial, request a hearing, present additional evidence or indicate an intention to present additional evidence, or (B) the claim was denied under the law in effect prior to March 1, 1978, following a formal hearing or administrative or judicial review proceeding.

30 U.S.C. § 932(a)(1982) provides:

> During any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803,

69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, and as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

30 U.S.C. § 932(c) (1982) provides:

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part,

out of employment in a mine during a period after December 31, 1969 when it was operated by such operator or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

30 U.S.C. §932(j)(1982) provides:

Notwithstanding the provisions of this section, section 9501 of Title 26 shall govern the payment of benefits in cases—

(1) described in section 9501(d)(1) of Title 26;

(2) in which the miner's last coal mine employment was before January 1, 1970; or

(3) in which there was a claim denied before March 1, 1978, and such claim is or has been approved in accordance with the provisions of section 945 of this title.

33 U.S.C. § 921(b)(3) (1978) provides:

The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

33 U.S.C. § 921(c) (1978) provides:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

33 U.S.C. § 922 (1978) provides:

> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in

conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

Title II of P.L. 97-119 provides:

SEC. 201 (a) This title may be cited as the "Black Lung Benefits Amendments of 1981."

(b) Except as otherwise specifically provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Black Lung Benefits Act.

SEC. 202 (a) The Fourth sentence of subsection (b) of section 413 is amended by inserting immediately after the words "In any case" a comma and the following: "other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981."

(b)(1) Paragraphs (2) and (4) of subsection (c) of section 411 are each amended by inserting a new sentence at the end of each as follows: "The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981."

(2) Paragraph (5) of subsection (c) of section 411 is amended by inserting a new sentence at the end thereof as follows: "The provisions of this paragraph shall not apply with respect to claims filed on or after the day that is 180 days after the effective date of the Black Lung Benefits Amendments of 1981."

(c) The third sentence of subsection (b) of section 413 is amended by inserting immediately after the word "affidavits" a comma and the following: "from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981."

(d) Section 430 is amended by striking the words "and by" and inserting in lieu thereof a comma, and by inserting immediately after the phrase "the Black Lung Benefits Amendments of 1981."

(e) The Secretary of Labor, in consultation with the Secretary of Health and Human Services, shall undertake a study of current medical methods for the diagnosis of pneumoconiosis, and of the nature and

extent of impairment and disability that are attributable to the existence of both simple and complicated pneumoconiosis. The study, together with appropriate recommendations, shall be transmitted to the Congress no later than eighteen months after the effective date of this title.

SEC. 203 (a)(1) Section 412(a)(2) is amended by inserting immediately after the word "or" a comma and the following: "except with respect to a claim filed under part C of this title on or after the effective date of the Black Lung Benefits Amendments of 1981."

(2) Section 412(a)(3) is amended by striking the first comma therein, and by inserting immediately after the word "or" the second time it appears therein a comma and the following: "except with respect to a claim filed under part C of this title on or after the effective date of the Black Lung Benefits Amendments of 1981,".

(3) Section 412(a)(5) is amended by striking out the second comma therein, by striking out the phrase "of a miner" the third time it appears therein, and by inserting immediately after the word "or" the second time it appears therein a comma and the following: "except with respect to a claim filed under part C of this title on or after the effective date of the Black Lung Benefits Amendments of 1981,".

(4) Section 401(a) is amended by striking the phrase "or who were totally disabled by this disease at the time of their deaths" each time it appears.

(5) Section 411(a) is amended by inserting immediately after the word "or" a comma and the following: "except with respect to a claim filed under part

C of this title on or after the effective date of the Black Lung Benefits Amendments of 1981,".

(6) Section 422(l) is amended by inserting immediately before the period at the end thereof a comma and the following: "except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981,".

(b) Subsection (g) of section 422 is amended by adding at the end thereof a new sentence as follows: "In addition, the amount of benefits payable under this section with respect to any claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981 shall be reduced, on a monthly or other appropriate basis, by the amount by which such benefits would be reduced on account of excess earnings of such miner under section 203(b) through (l) of the Social Security Act if the amount paid were a benefit payable under section 202 of such Act.".

(c) The Secretary of Labor shall undertake a study of the benefits provided by the Black Lung Benefits Act, other benefits received by individuals who receive benefits under that Act, and benefits which would be received were State workers' compensation programs applicable in lieu of benefits under that Act. The study, together with appropriate recommendations, shall be transmitted to the Congress no later than eighteen months after the effective date of this title.

(d) Paragraph (1) of subsection (a) of section 412 is amended by deleting the phrase "50 per centum of the minimum monthly payment to which a Federal employee in grade GS-2, who is totally disabled, is entitled at the time of payment under chapter 81 of

title 5, United States Code" and inserting in lieu thereof the phrase "37½ per centum of the monthly pay rate for Federal employees in grade GS-2, step 1".

SEC. 204 Subsection (d) of section 422 is amended by adding two new sentences at the end thereof as follows: "If payment is not made within the time required, interest shall accrue to such amounts at the rates set forth in section 424(b)(5) of this title for interest owed to the fund. With respect to payments withheld pending final adjudication of liability, in the case of claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, such interest shall commence to accumulate 30 days after the date of the determination that such an award should be made.".

SEC. 205 (a)(1) Subsection (c) of section 422 is amended by inserting "(1)" after "pneumoconiosis", and by inserting before the period at the end thereof a semicolon and the following: "or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 435".

(2) Subsection (j) of section 422 is amended by striking out "or" at the end of paragraph (1), by striking out the period at the end of paragraph (2) and inserting in lieu thereof "; or", and by adding at the end thereof the following:

"(3) in which there was a claim denied before March 1, 1978, and such claim is or has been approved in accordance with the provisions of section 435."

(b) Section 402 is amended by inserting at the end thereof the following new paragraph:

"(i) For the purposes of subsections (c) and (j) of section 422, and for the purposes of paragraph (7) of subsection (d) of section 9501 of the Internal Revenue Code of 1954, the term 'claim denied' means a claim—

"(1) denied by the Social Security Administration; or"

"(2) in which (A) the claimant was notified by the Department of Labor of an administrative or informal denial more than 1 year prior to the date of enactment of the Black Lung Benefits Reform Act of 1977 and did not, within 1 year from the date of notification of such denial, request a hearing, present additional evidence or indicate an intention to present additional evidence, or (B) the claim was denied under the law in effect prior to the date of enactment of the Black Lung Benefits Reform Act of 1977 following a formal hearing or administrative or judicial review proceeding.".

SEC. 206. (a) Except as otherwise provided, the provisions of this title shall take effect on January 1, 1982.

(b) If any provision of this title, or the application of such provisions to any person or circumstance, shall be held invalid, the remainder of this title, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

REGULATIONS:

20 C.F.R. § 725.309(c) provides:

A claimant who filed a claim for benefits under part B of title IV of the Act or part C of title IV of the Act

before March 1, 1978, and whose previous claim(s) are pending or have been finally denied, who files an additional claim under this part, shall have the later claim merged with any earlier claim subject to review under Part 727 of this subchapter. If an earlier claim subject to review under Part 727 of this subchapter has been denied after review, a new claim filed under this part shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim subject to review under Part 727 of this subchapter has been denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

20 C.F.R. § 725.309 (d) provides:

In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless that deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

20 C.F.R. § 725.310 (a) provides:

> Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

20 C.F.R. § 725.310 (d) provides:

> An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing or decreasing the amount of benefits payable may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, any payment made in excess of the decreased rate shall be subject to collection or offset under Subpart G of this part.

20 C.F.R. § 725.417 (d) provides:

> Each party shall, in writing, either accept or reject, in whole or in part, the deputy commissioner's recommendation, stating the reasons for such rejection. If no reply is received within 30 days from the date on which the recommendation was sent to parties, the recommendation shall be deemed accepted.

20 C.F.R. § 725.481 provides:

> Any party dissatisfied with a decision and order issued by an administrative law judge may, before the decision and order becomes final (see § 725.479), appeal the decision and order to the Benefits Review Board. A notice of appeal shall be filed with the Board. Pro-

ceedings before the Board shall be conducted in accordance with Part 802 of this title.

20 C.F.R. § 727.108 (c) provides:

The deputy commissioner may: (1) Request up-to-date information from the claimant pertaining to any matter affecting the amount of benefits payable (see Subpart G of Part 725 of this subchapter); and (2) request any additional information or verification which may be necessary to establish a more detailed and complete history of the miner's employment, for the purpose of determining the identity of any coal mine employer which may be liable for the payment of the claim, and for such other purposes as may be appropriate. Upon receipt of any additional information requested under this paragraph, or if the claimant fails to supply such information, the deputy commissioner may notify a coal mine employer, if any, of its possibile liability for the claim and proceed to adjudicate the claim under §§ 725.409-725.421 of this subchapter.

20 C.F.R. § 801.102 provides, in pertinent part:

(a) The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

. . .

(6) Title IV, Section 415 and Part C of the Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164, 91 Stat. 1290) (formerly the FCMHSA of 1969) as amended by the Black Lung Benefits Reform Act of 1977 (92 Stat. 95), and the Black Lung Benefits Revenue Act of 1977, Pub. L. 95-227, 92 Stat. 11.

APPENDIX G

Subsidiary of Old Ben Coal Company:

Algers, Winslow and Western Railway Company

Corporate Affiliates of Old Ben Coal Company:

BP ALASKA INC.
BP COMMUNICATIONS ALASKA INC.
BP OIL INC.
THE CARBORUNDUM COMPANY INCORPORATED
FRANKLIN COAL COMPANY
HURON LIBERIAN COMPANY
INLAND CORPORATION
KENNECOTT COMMUNICATIONS CORPORATION
KENNECOTT CORPORATION
KENNECOTT SANTA FE CORPORATION
KITT ENERGY CORPORATION
MIAMI VALLEY CORPORATION
MID-VALLEY PIPELINE COMPANY
MONITOR INSURANCE COMPANY LIMITED
MOUNTAIN CARBON COMPANY
PROSPECT INTERNATIONAL, C.A.
ROYAL LAND COMPANY
S. MINERALS, INCORPORATED
SOHIO ALASKA PETROLEUM COMPANY
SOHIO ALASKA TRANSPORTATION COMPANY
WEBB PARAGUAY, INC.
WEBB TONGA, INC.
VISTRON CORPORATION
WEBB DRILLING COMPANY
WEBB INTERNATIONAL MINERALS, INC.
SOHIO ALGERIA COMPANY
SOHIO ALGERIA SUPPLY COMPANY
SOHIO/BP TRANS ALASKA PIPELINE CAPITAL INC.
SOHIO COAL CONVERSION COMPANY
SOHIO COMMERCIAL DEVELOPMENT COMPANY
SOHIO CONSTRUCTION COMPANY
SOHIO de COLOMBIA COMPANY
SOHIO DEVELOPMENT COMPANY
SOHIO FINANCE COMPANY
SOHIO GAS PIPELINE COMPANY
SOHIO-IRAN TRADING, INC.
SOHIO PETROLEUM COMPANY
SOHIO PIPE LINE COMPANY
SOHIO SHALE OIL COMPANY
SOHIO SUPPLY COMPANY
SOHIO TRANSPORTATION COMPANY
SOHIO VENEZUELA COMPANY
SOHIO WESTERN CRUDE OIL COMPANY
SOHIO WESTERN MINING COMPANY
SPC SHIPPING INC.
UPPER KITTANNING INC.
VISTA VENTURES CORPORATION
THE VISTRON SUPPLY COMPANY
WEBB de COLOMBIA, S.A.

Office-Supreme Court, U.S.
FILED
MAR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1052

In the Supreme Court of the United States

OCTOBER TERM, 1982

OLD BEN COAL COMPANY, PETITIONER

v.

CORNELIUS J. BLAIZE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
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QUESTIONS PRESENTED

1. Whether an employer who has been relieved of liability for payment of black lung benefits by the 1981 amendments to the Black Lung Benefits Act and the Internal Revenue Code of 1954, and dismissed as a party in the court of appeals, has standing in this Court to contest a claimant's eligibility for benefits.

2. Whether, having dismissed the appeal for lack of a case or controversy, the court of appeals properly vacated as moot the decisions of the administrative law judge and the Benefits Review Board.

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Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 *et seq.* 2

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. (& Supp. V) 801 *et seq.*:

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1052

OLD BEN COAL COMPANY, PETITIONER

v.

CORNELIUS J. BLAIZE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 3-5) is unreported. The decision and order of the Benefits Review Board (Pet. App. 6-32) are reported at 3 Black Lung Rep. (MB) 1-710. The opinion and order of the administrative law judge (Pet. App. 33-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1982. A petition for rehearing was denied on September 22, 1982 (Pet. App. 1-2). The petition for a writ of certiorari was filed on December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See pages 5-7, *infra*.

STATEMENT

1. In March 1973, respondent Cornelius J. Blaize applied for benefits under "Part B" of Title IV of the Federal Coal Mine Health and Safety Act of 1969 (the Act), as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. 921-925. The claim was ultimately denied by the Social Security Appeals Council of the Department of Health, Education, and Welfare in September 1975 (Pet. App. 7-8 n.1; *id.* at 34).

In July 1974, while his initial claim was pending, Blaize filed with the Department of Labor a second claim for benefits under "Part C" of Title IV of the Act, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. 931-945.[1] Before this claim was determined, the Act was amended by the Black Lung Benefits Reform Act of 1977 (the Reform Act), Pub. L. No. 95-239, 92 Stat. 95 *et seq.*, to provide for review of previously denied "Part B" claims under new and expanded eligibility criteria. Blaize elected to have his previously denied "Part B" claim reviewed by the Department of Labor in accordance with Section 435(a)(1)(B) of the Act as amended by the Reform Act, 30 U.S.C. (Supp. V) 945(a)(1)(B). His "Part B" claim was then transferred to the Department of Labor and merged with his pending "Part C" claim. A deputy commissioner of the Office of Workers' Compensation Programs (OWCP) determined that Blaize was entitled to benefits under the Act as amended by the Reform Act, 30 U.S.C. (Supp. V) 945(a)(3)(A) and (b)(1), and identified petitioner Old Ben Coal Company as the

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[1] Part "B" of the Act applies to claims filed on or before June 30, 1973; these claims were to be adjudicated by the Social Security Administration. Part "C" applies to claims filed after December 31, 1973; these claims were to be adjudicated by the Department of Labor (DOL). Claims filed between July 1, 1973 and December 31, 1973, were to be adjudicated by DOL under Section 415 of the Act.

"responsible operator" (Pet. App. 8 n.1; *id.* at 34). Petitioner contested the award and requested a formal hearing before an administrative law judge (ALJ).

On February 28, 1980, after a hearing, the administrative law judge found that Blaize was entitled to benefits (Pet. App. 33-43). Petitioner appealed the decision to the Benefits Review Board (the Board), which, by a divided vote, reversed the decision and order of the administrative law judge and denied benefits (*id.* at 6-32).

2. Blaize and the Director, OWCP, sought review of the Board's decision in the court of appeals pursuant to 33 U.S.C. 921(c), as incorporated by 30 U.S.C. (Supp. V) 932(a). While this appeal was pending, the Act was amended once again by the 1981 amendments to the Black Lung Benefits Act and the Internal Revenue Code of 1954, Act of Dec. 29, 1981, Pub. L. No. 97-119, 95 Stat. 1635 *et seq.* Section 205(a)(1) of Title II of the 1981 amendments, which amends Section 422 of the Black Lung Benefits Act, was designed to relieve individual coal mine operators of unanticipated liabilities arising from application of the expanded eligibility criteria of the Reform Act when previously denied claims were reviewed under Section 435 of the Act.[2] Because Section 422(c), 30 U.S.C. (Supp. V) 932(c), relieved petitioner of all potential liability for Blaize's merged claims, the Director moved, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, to dismiss petitioner as a party, to dismiss the appeal, and to

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[2]Section 422(c)(2), 30 U.S.C. (Supp. V) 932(c)(2), relieves employers of liability for payment of claims that were denied prior to March 1, 1978, as occurred in this case. It transfers liability for payment of these previously denied claims to the Black Lung Disability Trust Fund (Trust Fund). If such claims are approved upon review under Section 435, 30 U.S.C. (Supp. V) 945, the Trust Fund, and not the employer, pays the benefits. Respondent Blaize's merged claims were reviewed and approved by the deputy commissioner under Section 435.

vacate the decision of the Benefits Review Board and remand the case to the deputy commissioner for assumption of liability by the Trust Fund.[3] Petitioner agreed that it should be dismissed as a party and that the appeal should be dismissed, since the 1981 amendments had removed its stake in the outcome of the proceedings and had rendered moot the issue of its liability. However, petitioner opposed the portion of the Director's motion that sought vacation of the Board's decision and a remand for assumption of liability by the Trust Fund.

The court of appeals granted the Director's motion (Pet. App. 3-5). It dismissed petitioner as a party, dismissed the appeal, and vacated the orders of the Benefits Review Board and the administrative law judge. The court noted that "[a]ll parties agree that Old Ben Coal must be dismissed as a party since the Revenue Act [1981 Amendments], Title II, §205 relieves the operator of liability and requires that the type of claim asserted here be presented to the Secretary of Labor for review, with benefits to be paid by the Black Lung Disability Trust Fund if approved by the Secretary" (Pet. App. 4). In explaining its decision to vacate the decisions of the Benefits Review Board and the administrative law judge, the court stated that "[t]he Revenue Act requires this court not only to dismiss this appeal but also to vacate all adjudicatory proceedings below in which Old Ben was the only party to contest the initial administrative finding" of entitlement by the deputy commissioner (*id.* at 5). The court rejected petitioner's contention that the 1981 amendments required the Director to be bound by the decision of the Benefits Review Board denying Blaize's claim of entitlement, reasoning that "Blaize and the Director should not be bound by an order of the Board when appellate review

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[3]Blaize did not object to this motion.

fails because of intervening mootness" (*ibid.*). The court concluded that "[s]ince the initial finding of eligibility is not affected, and since the Director takes the position that Blaize is entitled to black lung benefits, we assume that appropriate action will be taken to transfer liability for payment to the Trust Fund" (*ibid.*).

ARGUMENT

The petition should be denied because, under settled principles, petitioner lacks standing to contest the issue of respondent Blaize's entitlement to black lung benefits. The court of appeals properly granted the Director's motion to dismiss petitioner as a party and to dismiss the appeal as moot because Section 205(a)(1) of Title II of the 1981 amendments, enacted during the pendency of the appeal, relieved petitioner of all potential liability for payment of benefits to Blaize. In its response to the Director's motion, petitioner agreed that it should be dismissed as a party and that the appeal should be dismissed; petitioner does not question its dismissal as a party even now. In these circumstances, petitioner may not invoke this Court's jurisdiction under 28 U.S.C. 1254(1), and this case does not present a case or controversy as required by Article III of the Constitution.

1. Petitioner is expressly barred by Section 424(b)(1) of the Black Lung Benefits Act, 30 U.S.C. (Supp. V) 934(b)(1), from participating in any action brought to determine claims for benefits to be paid by the Black Lung Disability Trust Fund. That statute provides in pertinent part:

> No operator or representative of operators may bring any proceeding, or intervene in any proceeding, held for the purpose of determining claims for benefits to be paid by the fund, except that nothing in this section

> shall affect the rights, duties, or liabilities of any operator in proceedings under section [422] or section [423] of this title. In a case where no operator responsibility is assigned pursuant to section [422] and [423] of this title, a determination by the Secretary that the fund is liable for the payment of benefits shall be final.

The legislative history of this provision clearly demonstrates that Congress intended to preclude operators from participating in litigation concerning payments by the Trust Fund:

> While operators, by means of the tax levied against the sale or use of the coal they produce, pay into the fund, the operators are to have no title or interest in the fund assets; and operators will have no right to litigate any questions concerning the assignment of claims to the fund or the payment of benefits out of the fund's assets.

S. Rep. No. 95-209, 95th Cong., 1st Sess. 7 (1977).

Respondent Blaize's claim is one in which "no operator responsibility is assigned" pursuant to Sections 422 and 423. Section 422(c)(2), as amended by Section 205(a)(1) of Title II of the 1981 amendments, provides in pertinent part that "no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis * * * which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of [Section 435]." 30 U.S.C. (Supp. V) 932(c)(2). Blaize's "Part B" claim was denied by the Social Security Appeals Council of the Social Security Administration in September 1975 (Pet. App. 8); it thus clearly falls within the relevant statutory definition of a "claim denied" as one that was "denied by the Social Security Administration." 30 U.S.C. (Supp. V) 902(i)(1). Under Section 422(c),

as amended, once Blaize's "Part B" claim was denied by the Social Security Administration and merged with his pending "Part C" claim for review under Section 435, petitioner was no longer even potentially liable for payment of benefits because, even if the claim were subsequently approved, the Trust Fund would pay it.[4]

In light of this background, petitioner does not question that it was properly dismissed as a party in the court of appeals since Section 422(c) of the Act as amended relieved petitioner of liability for payment of Blaize's claim.[5] Because the Director agrees that Blaize is entitled to benefits, there no longer is an adversarial relationship or a case or controversy as required by Article III of the Constitution. See *Flast* v. *Cohen*, 392 U.S. 83, 94-95 (1968). Furthermore, because petitioner was properly dismissed as a party by the court of appeals, it may not seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1), which authorizes this Court to review cases in the courts of appeals "[b]y writ of certiorari granted upon the petition *of any party* to any civil * * * case * * *" (emphasis added).

2. Having recognized that petitioner no longer had a legally cognizable interest in the outcome of the case, the court of appeals properly applied the doctrine of *United*

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[4]Section 423, 30 U.S.C. (& Supp. V) 933, concerns insurance coverage requirements for operators found liable for payments under Section 422 and is therefore inapplicable to the instant case.

[5]Petitioner, in its response to the Director's motion to dismiss the appeal, conceded (at 7-8) that "Section 205 removes Old Ben's 'concrete stake in the outcome of the case' [citation omitted] * * *. Whether this Court affirms or reverses the Board's decision, Old Ben has no liability for payment of benefits as a result of enactment of Section 205. Thus, as to Old Ben, the issue of liability is moot. Accordingly, Old Ben is no longer a party adversely affected or aggrieved by the Board's decision."

States v. *Munsingwear*, 340 U.S. 36, 39 (1950), in which this Court stated:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is * * * to vacate the judgment below and remand with a direction to dismiss.

Accord, *A.L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 329 (1961) (*Munsingwear* procedure "equally applicable to unreviewed administrative orders"). The purpose of this procedure, as explained in *Munsingwear* (340 U.S. at 40-41), is to clear

> the path for future relitigation of the issues between the parties and [to] eliminate[] a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of the parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Petitioner contends that the court of appeals should not have applied the *Munsingwear* doctrine to the instant case because the case was not entirely mooted pending appeal. Specifically, petitioner argues (Pet. 11-12) that the issue of Blaize's entitlement to benefits and the issue of the procedural requirements for a claim to be "approved" under Section 422(a) of the Act as amended are still alive. However, the crucial point—overlooked by petitioner—is that there no longer is a live controversy among the parties to this case, a point that petitioner appears to have conceded below. See note 5, *supra*. As previously explained, under Section 422(c) of the Act as amended, 30 U.S.C. (Supp. V) 932(c), once respondent Blaize's "Part B" claim was denied by the Social Security Administration and merged with his pending "Part C" claim for review under Section 435, petitioner

was no longer even potentially liable for repayment of benefits; thus, even if the claim were subsequently approved, payment would be made by the Trust Fund.[6]

Petitioner also contends (Pet. 7-9) that the *Munsingwear* doctrine should not have been applied because the purposes served by the doctrine are not present here. In support of this contention, petitioner argues that the Board's order denying settlement has a limited res judicata effect, will not be applied to any collateral proceedings, and will not unfairly prejudice respondent Blaize. Contrary to petitioner's contention, however, the Board's order does have consequences adverse to the Director and to Blaize. First, the

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[6]There is no merit to petitioner's assertion (Pet. 8, 13) that Blaize's claim was not "approved" for payment by the Trust Fund because it was the Board that rendered the final decision of the Secretary of Labor and the Board determined that Blaize was ineligible for benefits. Petitioner fails to recognize that the Board is an independent, quasi-judicial body within the Department of Labor. 20 C.F.R. 801.102-801.104; cf. *Kalaris* v. *Donovan*, 697 F.2d 376 (D.C. Cir. 1983). Like any other party, the Director appears before the Board and has a right to seek review in the courts of appeals of adverse decisions rendered by the Board. 20 C.F.R. 725.482(a)(b). More importantly, petitioner overlooks the fact that under Section 424(b)(1) of the Act, 30 U.S.C. (Supp. V) 934(b)(1), "[i]n a case [such as this] where no operator responsibility is assigned pursuant to Section [422] [as amended] * * * a determination by the Secretary that the fund is liable for the payment of benefits shall be final." Contrary to petitioner's contention (Pet. 15 n.8), the Director is the designee of the Secretary responsible for administration and enforcement of the Black Lung Benefits Act. 20 C.F.R. 802.410(b); see *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 5 n.10. The deputy commissioner is authorized by the Director to make initial determinations with respect to claims, subject to review upon further development of the record, according to procedures established by the implementing regulations. See 20 C.F.R. 725.351(a)(1). In this case, the deputy commissioner issued an initial finding of entitlement with respect to respondent Blaize's claim in accordance with 20 C.F.R. 725.410(a)-(b), 725.411.

Board's decision that emphyzema may not qualify as statutory pneumoconiosis (Pet. App. 16) has precedential value adverse to the Director. Second, Blaize will have been effectively denied his statutory right of review of the Board's decision in the court of appeals. See 33 U.S.C. 921(c), as incorporated by 30 U.S.C. (Supp. V) 932(a). While Blaize retains the right to petition for modification of the Board's decision, his entitlement to such relief is conditioned on a showing "of a change in conditions or * * * a mistake in a determination of fact" by the Board. 33 U.S.C. 922, as incorporated by 30 U.S.C. (Supp. V) 932(a). Finally, if Blaize files a new application for benefits, his claim will be subject to the more rigorous eligibility criteria of 20 C.F.R. Part 718, applicable to all claims filed after March 1, 1980, and to additional eligibility and evidentiary requirements imposed by the 1981 amendments.

Petitioner finally contends (Pet. 14-17) that if the *Munsingwear* doctrine is found to be applicable in this case, the court of appeals' order should be modified so as to vacate the deputy commissioner's initial finding of eligibility as well as the subsequent orders of the ALJ and the Board. As the court of appeals correctly pointed out (Pet. App. 4-5), however, the initial finding was made by the deputy commissioner prior to identification of petitioner as the responsible operator and, therefore, prior to the point in time at which any rights or liabilities of petitioner attached. See 20 C.F.R. 725.410(a)-(b), 725.412(a). In these circumstances, the initial finding predates the controversy and need not be expunged.[7]

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[7]Although the court of appeals left the Director's initial finding of eligibility undisturbed, we do not interpret its decision as a general ruling that the Director is bound by his initial finding whenever the intervening mootness doctrine applies so as to require the vacation of subsequent adjudicatory proceedings. Here, the court of appeals did not order the Director to make payment from the Trust Fund. Rather,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

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the court stated that "[s]ince the initial finding of eligibility is not affected [by its order] and since the Director takes the position that Blaize is entitled to black lung benefits, *we assume that appropriate action will be taken to transfer liability for payment to the Trust Fund*" (Pet. App. 5; emphasis added). Thus, the court's order is consistent with the Director's position that in cases such as the present one, he retains flexibility to reassess his initial finding. In the instant case, no formal reassessment is necessary, however, since the administrative record was thoroughly developed, and the Director consistently has adhered to the position that Blaize is entitled to benefits.